

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI.

FEBRUARY TERM, 1874, AT ST. JOSEPH.

PEYTON V. HURT, Respondent, *vs.* LUCIUS SALISBURY, *et al.*,
Appellants.

1. *Corporation—Articles of Association not filed—Note issued by officers of company—Effect of.*—Where articles of association were duly acknowledged and recorded in the office of the recorder of the county where a corporation was located (Wagn. Stat., 333, § 2), but were not then filed with the Secretary of State (See Wagn. Stat., 289, 290, § 4), the officers of the corporation had no power to issue the note of the company; and a note issued and signed by them as directors, would bind them personally; and not the corporation. "Corporate existence," as used in the latter enactment, means full authority to transact business.

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Waters & Ray, for Appellants.

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Appeal from Chariton Circuit Court.

Waters & Ray, for Appellants.

I. The association in question takes its existence as a body corporate from the date of recording the certificates with the recorder of the county, and not from the time of filing the same with the Secretary of State, as specified in Sec. 4, of Art. I, page 289, 1 Wagn. Stat.

Where there are general provisions common to a variety of subjects of a kindred nature, and special provisions applicable to each particular class, and they happen to be inconsistent, or in conflict, then the special regulation shall control the general. Sec. 4 of Art. 1, and sec. 2 of Art. 7 of Chap. 37, are manifestly inconsistent. The first, being general, is subservient to the second, which is special. The latter section declares that, "The persons so acknowledging and giving said certificate and their associates and successors, shall for a term not exceeding fifty years next succeeding the recording of such certificate, be a body corporate, &c., &c."

This clearly fixes the time when its corporate existence commenced, and this section governs associations under this article to the exclusion of the general provisions contained in Sec. 4 of Art. 1, when the two are inconsistent with each other.

II. Under the theory of appellants, the note cannot bind them individually. (*Murray vs. Caruthers*, 1 Metc. [Ky.], 70.)

Shackelford, for Respondent.

I. Under § 4, Art. 1, Ch. 37, Wagn. Stat., the corporate existence of the corporation dates from the time of filing with the Secretary of State. The provisions of Art. 7, § 2 do not modify the former general provision.

II. If the corporation had no existence at the time of the execution of the note sued upon, then the persons signing the note were personally liable. It was their duty if they intended to act only as agents, to see that a principal was in existence who was bound by their acts. (See 38 Mo., 245; 27 Mo., 162; 20 Mo., 284.)

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III. If a person undertakes to contract as agent for an individual or corporation, and contracts in a manner which is not legally binding upon his principal, he is personally responsible, and the agent when sued can exonerate himself from personal liability only by showing his authority to bind those for whom he has undertaken to act. It is not for plaintiff to show he had not authority; the defendant must show affirmatively that he had. (See *Mott vs. Hicks*, 1 Conn., 536; *Tippets vs. Walker*, 4 Mass., 595; *Randall vs. VanUtcher*, 19 Johns., 63; *Steen vs. Wood*, 7 Conn., 454.)

ADAMS, Judge, delivered the opinion of the court.

This was an action brought by the plaintiff against the defendants on the following promissory note :

"(\$1,000.00.) SALISBURY, Mo., February 22nd, 1869.

Twelve months after date, for value received, the undersigned as Directors of the North Missouri Central District Stock, Agricultural and Mechanical Association, promise to pay Peyton T. Hurt or order, the sum of One Thousand Dollars, negotiable and payable without defalcation or discount, and with interest from date at ten per cent. per annum.

"Signed: LUCIUS SALISBURY, M. L. HURT, ELI WAYLAND, M. B. WILLIAMS, J. A. JOHNSTON, Directors; JAMES W. LEWIS, as Director."

The petition charges, that the plaintiff loaned the defendants the money mentioned in the note on their individual responsibility and took this note as their personal contract for the same. The answer denied that the defendants borrowed the money on their personal responsibility and charged that they were acting as directors for the "North Missouri Central District Stock, Agricultural and Mechanical Association;" that this association is, and was when the note was given a corporation duly organized under the laws of this State, and the note was the note and contract of the corporation, and not the individual or personal note of the defendants. The plaintiff, by replication, denied the new matter set up in the answer. The

case was submitted to the court for trial and resulted in a verdict and judgment for the plaintiff.

From the evidence offered and given, the leading facts of the case are, that the corporation referred to was duly organized under section 2 of article 7, 1 Wagn. Stat., 333, (Genl. Stat. 1865, Chap. 62, § 2, p. 367), and that the certificate or articles of association were duly acknowledged and recorded in the Recorder's Office of Chariton County, where the corporation was located, on the 10th day of July, 1868, but were not filed with the Secretary of State under the provisions of section 4 of article 1, 1 Wagn. Stat., 289, till some time after the commencement of this suit.

Upon this state of facts, the court excluded the defense, and held the defendants personally liable. The only question raised by the record is as to the time the corporation had a legal existence to transact business. It may be, that the note itself being given in the name of the alleged corporation, would be sufficient in a suit against it upon the note, to estop it from denying its own existence. But this is a suit not against the corporation, but against individuals assuming to act as agents for an existing corporation. In such case it is their duty to prove that their principal had a legal existence, and was capable in law of borrowing the money and executing its note for it, at the time such note was given. The question, therefore, recurs as to the time when this corporation was authorized to commence its business. The solution of this question depends upon the two sections of the statute above referred to, which, in their construction, must be read together and reconciled if possible. Sec. 2 of chapter 62, Gen'l Statutes 1865, being Sec. 2, 1 Wagn. Stat., 289, provides that "Whenever any corporation shall be organized under the laws of this State, it shall be the duty of the officers of said corporation to file with the Secretary of State a copy of the articles of association or corporation, and the corporate existence of such corporation shall date from the time of filing said copy of such articles, and a certificate by the Secretary of State under the seal of the State, that said corporation has become duly organ-

ized, shall be taken by all courts of this State as evidence of the corporate existence of such corporation," &c. This section clearly contemplates that all corporations which come into existence by virtue of articles of association under the laws of this State, must, through their officers, file with the Secretary of State a copy of such articles, and that the date of their "corporate existence" shall be that of the filing of the articles in the Secretary's Office. The meaning of the phrase, "corporate existence," as used here, must be when the corporation is fully authorized to transact all business for which it was created. Undoubtedly this section refers to corporations which have already been organized under some other provisions of our statute, by means of articles of association voluntarily entered into for that purpose, but whose powers to transact business must lie dormant until a copy of the articles shall be filed with the Secretary of State. That was precisely the case with this corporation. It had organized under section 2, Chap. 69, Gen'l Statutes, 1865, page 367, by signing and acknowledging and recording in the Recorder's Office of the proper county the articles of association. This step being taken, it was an organized corporation, not for the transaction of business, but for the purpose of taking the next and last step to complete its authority to transact business, and give a date to its legal existence. Until the officers took this final and necessary step by depositing and filing in the office of the Secretary of State a copy of the articles of association as they stood recorded in the county, this corporation had no power to issue the note sued on. As it had no power to issue this note, the defendants are undoubtedly liable.

Under this view, the judgment must be affirmed. All the judges concur.

THOMAS S. GILLETT, Appellant, vs. THE MISSOURI VALLEY
RAILROAD COMPANY, Respondent.

PER VORIES, J.

1. *Corporations—Liability of, for malicious acts of agents—Confined to what cases.*—The result of the cases seems to be, that where corporations have been held liable for the malice of their agents, the acts of the latter were not only in the scope of the supposed authority of the particular agent committing the act complained of, but the act done by the agent was done in the performance of business coming within the purview of the objects and purposes for which the corporation was created, and the powers were conferred by the charter.

PER CURIAM.

2. *Railroad corporations—Suits against, for malicious prosecutions—When entertained—Reasonable cause no defense when.*—A railroad corporation is not liable for a malicious prosecution, instituted by its agents, against one of its officers, in the name of the State, for alleged embezzlement of its funds; there being no pretense that any power was given the company to engage in such prosecutions or that they came within the scope of its general powers or purposes.

In such suit for damages the company cannot defend by alleging that there was reasonable cause for the prosecution.

PER ADAMS, J. CONTRA.

3. *Railroad companies liable to damages for malicious prosecutions when—*Where railroad corporations, through the malice of their officers, institute groundless prosecutions, they should be made liable to the party injured in an action for malicious prosecution.

The prosecution of criminal offenders, especially when irresponsible in a civil action, is not only within the scope of the authority of such corporations but becomes their imperative duty.

Appeal from Buchanan Circuit Court.

Hill & Carter, and Loan & Van Waters, for Appellant.

The doctrine of *Childs vs. Bank of Missouri*, (17 Mo., 213.) is not the law now in relation to the questions involved in this case. (*Reg. vs. Gr. North. of Engl. R. R. Co.*, 58 Eng., C. L. 314, 324; *Goodspeed vs. East Haddam Bank*, 22 Conn., 530.)

A corporation may be guilty of trespass. (*Ang. & Ames, Corp.*, [4 Ed., 387.] and authorities there cited. Also *Ousley vs. Montgomery R. R. Co.*, 37 Ala., 560; *Brakeman vs. N. J. Railroad & Transfer Co.*, 3 Vroom [N. J.,] 328; See

Soulard vs. City of St. Louis, 36 Mo., 546; Towns. Sl. & Lib., 360-361, and n. 1341.) It may be liable for malicious prosecution. (Towns. Sl. 261, and notes; Merrill vs. The Tariff Manuf. Co., 10 Conn., 384.) A corporation is liable for the wrongful acts of its agents while acting for it, and by its discretion, notwithstanding such acts may relate to matters outside their power and authority conferred on the corporation. (Whitfield vs. South East. Railw. Co., 1 El. B. El., 115; 96 Eng. Com. Law 113; Also Phil. Wilm. & Balt. R. R. Co. vs. Quigley, 21 How., U. S., 202; Rhodes vs. Cin., 10 Ohio, 160; Chesnut Hill & Spring House Turnpike Co., vs. Rutter, 4 Seg. & R., 16; Moore vs. R. R., 4 Gray, 465; Higgins vs. Watervliet Turnpike Co., 46 New York 23; Soulard vs. City of St. Louis, 36 Mo., 546, 553.)

B. F. Stringfellow, and Hall & Oliver, for Respondent.

I. A corporation cannot be guilty of a malicious prosecution. (Childs vs. Bank of Missouri, 17 Mo., 213; Stevens vs. Midland Railway, 10 Exch. [Hurls. & G.,] 352; 49 Mo., 273.)

II. A corporation cannot be liable for an act which is not actionable unless it be wilfully and maliciously done, for the reason that a corporation can act only by agents, and a principal is not liable for injuries done wilfully and maliciously by his agent. (McManus vs. Bucket, 1 East, 67; Ang. & Am. Corp., §§ 385, 388; Mason vs. Stiles 21 Mo., 374.)

III. It is impossible that the act complained of in this case could have been done by any agent or employee of defendant in the course of his employment. To institute a malicious prosecution is not, and cannot be the duty of any officer, agent or employee of a railroad company. And if the act complained of was not done in the cause of the employment of the individual who committed it, the defendant is not liable. (39 N. Y. 382; 19 Wend., 343.)

VORIES, Judge, delivered the opinion of the court.

This action was brought by the plaintiff against the defendant to recover damages for a malicious prosecution. The

petition charges that defendant is a corporation dny incorporated, &c.; that said company had in its employ as its agent one Joseph S. Ford, who was chief secretary and treasurer of said company and so acted as its agent in the line and scope of his authority at the time of the injuries hereinafter mentioned, and who, by virtue of said office, had control and management of the receipt and disbursement of the funds of said company; that plaintiff was in the employ of said company in the capacity of clerk, and had the control and management of certain funds, and had the management and disbursement of certain receipts and funds of said company, under the control and direction of said Ford who was his superior officer in that respect; that defendant, on the 22nd day of July 1869, by virtue of an affidavit made by said Ford, while acting in the line and scope of his authority, did maliciously and corruptly cause the said plaintiff to be arrested and imprisoned, for the embezzlement of certain funds of said company, of which said Ford had control as agent of said defendant aforesaid, did then and there before one A. Saltzman, a justice of the peace in and for Washington township in Buchanan county, while acting in the line and scope of his authority, make and file with said Saltzman his affidavit and charge that plaintiff had embezzled and converted to his own use, without the consent of said railroad company, a large amount of money to-wit: Five hundred dollars, the property of said company, which said defendant alleged had come into his possession and control by virtue of his employment as clerk of said company; that said Ford while acting in the line and scope of his authority for said company, did further charge that plaintiff had embezzled and converted to his own use, without the consent of said company, divers other moneys, &c., (setting out the particular funds) all of which had come into his hands or possession by virtue of his employment as clerk of said company. That the charges so made by said Ford, while acting in the line and scope of his authority as agent of said company, he, the said Ford, well knew to be false and malicious, yet, notwithstanding, the said

defendant, by its agent, as aforesaid, caused said justice of the peace, who was then a duly elected justice of the peace in said county, and had full power for said purpose, to issue a warrant for the arrest and imprisonment of plaintiff upon said charge; that a warrant was issued at the instance of defendant upon said false and malicious charge, and plaintiff arrested and held in custody thereunder &c.; that defendant well knowing said charge to be false, caused the proceedings to be commenced in the name of the State of Missouri, &c.; that plaintiff was afterwards fully acquitted and the proceedings dismissed.

The petition, after charging other acts in aggravation of damages &c., and a want of any reasonable cause for the prosecution, concluded by praying judgment for damages.

The defendant in its answer fully denies the material allegations in the petition, and as a further answer sets up as a separate defense to the action, that said defendant had reasonable and probable cause for the charge alleged in said petition, and for charging that plaintiff had been guilty of embezzlement as charged in the petition, and the answer further charged that the petition did not state facts sufficient to constitute a cause of action. A replication was filed denying the new matter set up in the answer.

The cause afterwards came on to be heard, and after a jury had been impaneled to try the cause, the plaintiff offered evidence which it is admitted was competent to prove the facts stated in the petition. This evidence was objected to on the ground that the facts stated in the petition were not, in law, sufficient to constitute a cause of action against the defendant. The court sustained the objection, and excluded all evidence in the case. After this the plaintiff suffered a non-suit with leave to move to set the same aside, which said motion was afterwards made and overruled by the court, when the plaintiff excepted and has appealed to this court. It will be seen that the only question involved in this case, is whether a railroad corporation in a case like this, is liable to the party injured for a malicious prosecution instituted by their agent in

the name of the State, It is contended, by the defendant, that a corporation is not capable of malice, and that therefore no such action can be maintained against it.

In the case of Childs vs. The Bank of the State of Missouri, (17 Mo., R. 213,) the same question involved in this case was before this court, and if we are to adhere to the reasoning of the learned judge who delivered the opinion of the court in that case, the present case must be decided in favor of the defendant, and the judgment appealed from in this case be affirmed. But we are urged by the plaintiff to reconsider that decision. The plaintiff insisting that the law on the subject of corporations, has been by the courts of the country, since that decision, so modified as to conform the decisions of the courts to the advanced condition of the country, and that the law as ruled in that case should be so modified as to conform to the recent decisions of our sister States on the same subject. It must be admitted that within the last few years the great increase in the number of corporations, by which the greater part of the commercial business of the country is being transacted, assuming, as they do, all the functions of individuals, has induced a tendency in the recent adjudications on the subject, to assimilate the rights and duties of corporations, to the rights and duties of natural persons; and to hold corporations as responsible for the acts of their agents within the scope of their authority, and within the scope, power and objects of the creation of the corporation, just in the same manner and to the same extent as if they were natural persons. It is said in the opinion delivered in the case of Childs vs. the Bank, before referred to, that "the Bank is a corporation, it cannot utter words, it has no tongue, no hands to commit an assault and battery with, no mind, heart or soul to be put into motion by malice. Therefore if it was an action for an assault and battery, or for a malicious prosecution or for slander, we should at once say, that such could not be maintained." I think this language is too general and extensive, and the current of the modern authorities do not go to that extent. It seems to be held by

the best considered and the current of modern authorities, that there are many cases in which corporations may be made liable for assaults and batteries committed by their agents, for libels published by their agents and even for malicious prosecutions instituted by their agents; provided in all such cases that the act done comes within purview of the objects, purposes, and powers of the corporation, under its charter, and provided that the act of the agent is within the scope of the authority conferred on him, or is ratified by the corporation.

In the case of *Higgins vs. The Watervliet Turnpike Company*, (46 N. Y. 23,) the action was brought to recover damages by one who had been wrongfully ejected from a railroad car by the conductor. It was held that the railroad company was responsible in damages for the wrongful acts of its servants, if such acts were committed in the business of the company, and within the scope of the servant's employment, and this, though the servant had departed from his instructions in committing the act; and that it made no difference that there was justifiable cause to eject the passenger from the car, if excessive force was used in so doing. The case of *Whitfield vs. The South Eastern Railway Company*, (96 Eng. Com. Law R. 113) was an action brought by the plaintiff against the railroad company for a libel. It was charged in the declaration that the defendants were the proprietors of, and by their servants and agents managed and conducted, a certain system of electric telegraph, upon, along and over their line of railway, for the purpose of enabling, and so as to enable the defendants to transmit messages from one to another of their stations; and that defendants from time to time transmitted thereby, and had the care and custody of all messages transmitted; that the plaintiffs were bankers issuing notes, receiving deposits, &c.; that defendants before the commencement of the suit, wrongfully, falsely and maliciously, by means of such telegraphic dispatches sent to said several stations, published the said libelous matter complained of, &c.

The declaration was demurred to. It was held by the court that express malice was not necessary to be proved, that it was only requisite to prove the wrongful act, and malice would be implied, and at least as some of the counts imputed negligence in the transmission of the dispatches the demurrer ought to be overruled. It was also held in the case of *The Philadelphia, Wilmington and Baltimore R. R. Co. vs. Quigley*, (21 How., U. S. 202,) that the railroad company was liable in an action for a libel published by the directors of the company in the course of their business, which injuriously reflected on a stranger to the company. In the case of *Colman vs. New York and New Haven Railroad Company*, 106 Mass., 100, the plaintiff sued the company for injuries received by plaintiff, by an assault and battery committed by the servants of the defendant, in expelling the plaintiff from a car which he was wrongfully in, and from which they had a right to expel him. It was held by the court that the plaintiff could recover for injuries received by unnecessary violence used by said agents in his expulsion, by which he was damaged, although said violence was wilful on the part of the agent; and to the same effect is the case of *Moore vs. Fitchburg R. R. Co.*, (4 Gray., 465.) And in a late case in California it has been held that "the directors of a corporation are its chosen representatives and constitute the corporation to all purposes of dealing with others; what they do within the scope of the objects and purposes of the corporations, the corporation does. If they do an injury to another, though it involves in its commission a malicious intent, the corporation must be deemed by imputation to be guilty of the wrong and answerable for it as an individual would be in such cases." (*Maynard vs. Firemen's Fund Insurance Co.*, 34 Cal. 48) In the case of *Goodspeed vs. The East Haddam Bank*, (22 Conn. R., 530,) the action was founded on a statute of the State of Connecticut to prevent vexatious suits; but which was subject to the same general principles as actions on the case for malicious prosecutions at common law. The plaintiff charged that the defendant, the "East Haddam Bank," a corporation, without

probable cause, and with a malicious intent, unjustly to vex, harass, embarrass and trouble plaintiff, commenced by writ of attachment, and prosecuted against him, a certain vexatious suit for fraudulent representations to the injury of said Bank, and which action resulted in a verdict and judgment against the bank. It was held by the court that the action would lie and that the plaintiff could recover. So in the case of *Goddard vs. Grand Trunk Railway*, recently decided in Maine and published in the *American Law Register* January 1871, after a full and elaborate review of all of the cases on the subject, it was held that a corporation, a common carrier of passengers, is responsible for wilful misconduct of its servants towards a passenger, and that where the servants in charge of the car by which the passenger is being carried, grossly insult and assault the passenger thereon, and the company retain the servant in its employ, the company will be liable in exemplary damages.

I might refer to many other cases to the same purport of those already referred to, but it would be useless to do so. The cases already named are sufficient to show that a number of the most respectable authorities now assert that corporations are held to be liable for the wilful and malicious acts of their agents done in the course of their employment, and that for the wilful and malicious acts of their agents exemplary damages may be recovered.

This court following these recent decisions, in the case of *Lewis Perkins vs. The Missouri Kansas and Texas Railroad Co.*, decided at the Jan. term 1874, *ante* p. 201 held, that the Railroad Company was liable for a wilful assault made on a passenger, by the conductor of the train, while ejecting him from the car for failing to pay his passage, and it was held in that case that where the conductor wilfully used unnecessary violence in ejecting the passenger, by which the passenger was injured, punitive damages could be recovered. It may therefore now be considered as settled, so far as this court is concerned, that where an agent of a railroad company, acting in the scope of his authority in the business of

the company, commits unnecessary acts of violence, in a wilful and malicious or wanton manner, and injury ensues therefrom, the company is liable for said wilful acts, and that in such case punitive damages may be recovered. It will be seen by reference to all of the cases before referred to, that the acts of the agents for which the corporations were held to be liable, were not only in the scope of the supposed authority of the particular agent committing the act complained of, but that the act done by the agent was done in the performance of business coming within the purview of the objects and purposes for which the corporation was created and the powers conferred by its charter. In the case before referred to in the Connecticut reports, which is the only case to which our attention has been called where an action for a malicious prosecution has been sustained against a corporation, the action complained of was a civil suit by way of attachment, brought by the corporation, in the name of the corporation, to recover for damages to the property rights of the corporation, which action it was charged had been brought and the plaintiff's property attached for the purposes of vexation, and maliciously brought without any probable cause &c., It is very clear that the action brought in that case came within the powers of the corporation to sue for injuries to its property, and if that power was abused and perverted to malicious purposes, it was properly held that the corporation should be held liable for whatever damages might result.

In the case under consideration we are asked to go one step further, and hold that a corporation for railroad purposes is liable for a malicious prosecution, instituted by its agents, against an individual, in the name of the State, for a crime committed against the laws of the State, without showing that any power was given to the corporation to engage in such prosecutions, or that it comes within the scope of its general powers or purposes. This we think cannot be done. It is true in this case that it is stated in the petition that the corporation caused the plaintiff to be arrested, and that it was in the scope of the power of the agents; but it must be recol-

lected that the stockholders of a corporation only constitute their directors and other officers, their agents in their corporate capacity, to bind them in such matters as come within the objects of their incorporation, and within the powers granted by their charter. When they act wholly outside of these objects and powers, the corporation is not bound. It is certainly not within any usual objects or powers of a railroad company to prosecute criminally offenders against the criminal laws of the State, and it is not pretended that any such power was ever specially conferred on the defendant in this case. And it can make no difference that the defendant in this case has set up in its answer that there was reasonable cause for the prosecution. (*Mali vs. Lord*, 39 N. Y. R., 381.)

The judgment is affirmed. Judge Adams dissents. The other judges concur.

Dissenting opinion of ADAMS, J.

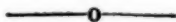
I have not been able to give my assent to the result arrived at by the court. I fully concur in the arguments and illustrations of the learned judge, and the authorities by which they are supported. But in my judgment they ought to have led to a different result. It must be conceded on all hands that railroad companies are created and carried on mainly for the profits in money to be derived from them. They have the undoubted right to protect themselves in the enjoyment of their moneys and property. That they may maintain civil actions for the robbery of their treasury, or for the destruction of their property by incendiaries and others, there can be no dispute, but where such robbers and incendiaries are wholly insolvent, have they no authority to resort to the criminal laws for the protection of their property? May they not cause such persons as threaten to destroy their property to be arrested and compelled to give security for their good behavior? It would seem to be manifestly just, and within the scope of their corporate power, to allow them to use all means known to the laws to protect themselves from threatened danger. If they can thus protect themselves in advance,

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why can they not use their own means to bring criminals to justice, who have robbed them or burnt up or destroyed their property? Must an outlaw be suffered to go free who has burned their depots, cars and bridges, simply because he is insolvent and a civil action would be unavailing.

In my opinion it is not only within the scope of their authority, but it would be their imperative duty to use their means in the prosecution of such offenders?

If that be conceded, and they should be guilty of instituting through the malice of their officials a wholly groundless prosecution, they ought to be liable to the party injured in an action for such malicious prosecution.



THE CHICAGO, ROCK ISLAND AND PACIFIC R. R. Co., Respondent, vs. HENRY FRANKS, Appellant.

1. *Mandamus—Justice of the Peace—Appeal.*—Mandamus will not lie to compel a justice of the peace to grant an appeal. (State *ex rel.*, Wheeler v. McAuliffe, 48 Mo., 112.) The remedy in such case is by rule and attachment from the Circuit Court. (W. S., 849, § 10.)

Appeal from Davies Circuit Court.

John Connover, for Appellant.

I. The commands of the writ are unauthorized. It commands the relator to do a certain specific, judicial act (to-wit: grant the appeal), while the real object of the writ is only to require the inferior court to act, and not prescribe what its action shall be. (Mos. Mand., 23, 34 and 53; Tap. Mand. 280; Rex. vs. West Rid. York. Justices, 56 Barn. & Ad., 667; 28 Mo., 279; Dunklin Co. vs. District Court, 23 Mo., 449; State vs. Lafayette Co., 41 Mo., 221; State vs. Wilson, 49 Mo., 146; People vs. Judges Wayne Co., 1 Manning, Mich., 359; *In re* Turner, 5 Ohio, 542; Fish vs. Weatherwax, 2 John's Cas., 215.)

II. The relator mistook his remedy; he should have pro-

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ceeded by rule and attachment. (Wagn. Stat., 849, § 10 State vs. McAuliffe, 48 Mo., 112.)

III. The granting, or refusing to grant an appeal, is a judicial act, and hence, not within the scope of mandamus. (Jordan vs. Hanson, 49 N. H., 199; Wortheimer vs. Howard, 30 Mo., 420; State vs. Towle, 42 N. H., 546; Tichenor vs. Hewson, 2 Greenl., N. J., 26; Chickering vs. Robinson, 3 Cush., 543; Way vs. Townsend, 4 Allen, 114; State vs. Dunington, 12 Md., 340.)

Wm. M. Rush, Jr., & Matt. Ewing, for Respondent.

Mandamus is the proper remedy. Attachment could not be resorted to except in term time. This writ was issued in vacation, and when the relator's property was levied upon and advertised for sale; and had relator waited until such time as it could obtain a rule and attachment upon the Justice, its property would have been sold, and the proceeds paid over to the plaintiffs, in the execution, and relator's remedy lost. We are aware that the Supreme Court of this State (*State ex rel. Wheeler vs. McAuliffe*, 48 Mo., 112) has held that mandamus will not lie against a Justice compelling him to grant an appeal, on the ground that the statutory rule and attachment is the specific remedy in such cases; but in that case the writ of mandamus was issued in term time, when a rule and attachment might have been obtained. An alternative writ of mandamus is in the nature of a rule. (10 Wend., 25 and 30; 3 How. Pr., 165; 4 Ark., 69; 4 Cow., 403.)

ADAMS, J., delivered the opinion of the court.

This was a proceeding by mandamus, to compel the defendant, an acting justice of the peace, to grant an appeal in a certain case in which the plaintiff was defendant, and one Benjamin C. Mapes was plaintiff and had obtained a judgment against the plaintiff. The defendant, acting as justice of the peace refused to grant the appeal, upon the alleged ground that the plaintiff had not complied with the provisions of the statute in regard to the appeal bond, etc. The only

question presented by this record is whether mandamus will, under any circumstances, lie to compel a justice of the peace to grant an appeal. In granting appeals, a justice of the peace acts in a judicial and not a ministerial capacity. He must, as a judicial officer, decide whether the statutory steps have been complied with to authorize the appeal. The appellant, or some one for him, is required to make a proper affidavit for the appeal, and also a proper recognizance with sufficient sureties must be given, and the justice must decide whether the affidavit and recognizance are sufficient. In *Jordan vs. Harrison*, (49 N. H., 199; 6 Am. Rep., 508,) the Supreme Court of New Hampshire expressly decided that a justice of the peace, in discharging his duties, must determine "whether the right of appeal exists, whether it is demanded in due time, and whether the security offered is in form and substance sufficient;" and these acts are judicial in their nature. In *Wortheimer vs. Howard*, 30 Mo., 420, it was held by this court that the acts of a justice of the peace, from the beginning to the end of a suit, including the issuing of an execution, are judicial and not ministerial.

It is well settled that a mandamus will not lie to control a judicial officer or court in their decisions. But this court in State of Missouri, *Wheeler vs. McAuliffe*, 48 Mo., 112, expressly held, that mandamus does not lie to compel a justice of the peace to grant an appeal. The statute (Wagn. Stat., 849, § 10) provides the remedy to be pursued, when the justice fails to allow an appeal. This remedy is by rule and attachment, to be issued by the Circuit or other court having jurisdiction, to compel the justice to allow the appeal, and mandamus cannot be resorted to.

Judgment reversed; all the judges concur.

Orr, et al. v. How, et al.

WILLIAM ORR AND ALFRED A. CHESMORE, Respondents, vs.
LUTHER B. HOW, AND ANN P. HOW, Appellants.

1. *Mortgage, to firm name.*—The fact that a mortgage is given to mortgagees in their firm name, does not affect its validity.
2. *Conveyance—Description in, what sufficient—Parol evidence to identify land, when proper.*—The description in a deed which gives the “beginning corner” and the several courses so that it may be easily identified is sufficient, and parol evidence may be adduced to identify the land, where its locality is called in question.
3. *Practice, civil—Pleadings—Caption—Names of parties.*—In suit by a firm where the individual names of plaintiffs are set out in the caption of the petition, that is sufficient.

Appeal from De Kalb Circuit Court.

S. G. Loring, for Appellants.

I. The mortgage deed was void for uncertainty of the description of land. The ambiguity was apparent upon the face of the instrument. (Hardy vs. Matthews, 38 Mo., 124.)

II. The opinion of Pritchard, that he could find the land from the description on the mortgage deed, was inadmissible. (Schultz vs. Lindell, 30 Mo., 320; Blumenthal vs. Ralls, 24 Mo., 113.)

Strongs & Hedenburg, for Respondents.

I. The caption of the petition shows both the firm and individual names of respondents, and the body of the petition shows that respondents were partners, and were suing as such; this is enough. (Higgins vs. Han. & St. J. R. R. Co., 36 Mo., 431; State vs. Patton, 42 Mo., 530, *id.*, 537.) Besides this point is waived by the answer.

II. The evidence of John Pritchard, a surveyor—who is not contradicted—showed that the description of the land was definite, certain and well known. There was no error in admitting his evidence, and the note and mortgage.

ADAMS, Judge, delivered the opinion of the court.

This was a suit to foreclose a mortgage given by the defendants, to secure a note which had been executed by the defendant, Luther B. How, to the plaintiffs.

The defendant Ann P. How, the wife of Luther B. How, joined in the mortgage, and was made a defendant. There was no objection to her joinder.

The plaintiffs were co-partners under the name of Orr & Chesmore, which is shown by the caption of the petition. The note was executed to them by their partnership name, and the mortgage was given to them in their partnership name.

The defendants, on the trial, objected to the introduction of the note on the alleged ground of a variance between it and the note set forth in the petition. But there seems to be no substantial variance, and the court committed no error in admitting the note as evidence. The defendants also objected to the mortgage on the ground that there was no description of the property conveyed, and because it was made to the plaintiffs by their firm name. This objection was overruled, and the defendants excepted. The plaintiffs introduced a witness who was a surveyor, and he testified that he had surveyed the lot of land, and could find it from the description in the mortgage deed. This evidence was objected to by the defendants, but the objection was overruled, and the defendants excepted. The fact that the mortgage was given to the plaintiffs in their firm name, did not affect its validity.

The mortgage described a small parallelogram of land, and gave the "beginning corner," and the several courses and distances, so that it might be easily identified. In my judgment that was a sufficient description. I can see no objection to the evidence of the surveyor, which identified the description of the land as existing on the ground.

The evidence was unnecessary, as the mortgage itself sufficiently described the land. Parol evidence is not admissible to control the description of premises in a deed. The deed itself must give a sufficient description, but parol evidence may be resorted to, to identify the land as existing on the ground, in cases where its locality is called in question.

The objection that the suit was not brought in the proper names of the plaintiffs, is contradicted by the caption to the petition. The individual names of the firm are set out

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in the caption, and that is all that was necessary. (Wagn. Stat., 1013 § 3.)

Judgment affirmed. All the judges concur.



JOHN CATLETT, *et al.*, Appellants, *vs.* HESTER D. CATLETT,
Respondent.

1. *Wills—Under general law, what signing insufficient.*—As a general rule of law, where the name of the testator is not subscribed at the conclusion, but only appears in the exordium or body of a will, the instrument, in order to its validity, must have been in the handwriting of the testator and he must have intended the signature, wherever inserted, to be the authentication of the instrument, and must have contemplated no further signing.

Where the will concludes, "In witness whereof, I have hereunto set my hand," etc., a different signing being clearly contemplated, the formal recital of his name elsewhere in the instrument would be insufficient.

2. *Will—Signature—What necessary under the statute.*—Under the statute law of Missouri, a will written by an attorney at the request of a friend, out of the presence of the testator, and not subscribed, is not "signed" within the meaning of the statute (Wagn. Stat., 1364, § 3), although the name of the testator appear in the exordium or body of the will, and is invalid, although expressly assented to by him and duly attested in his presence.

The statute, *supra*, is imperative, and the "signing," therein referred to, must be construed to mean the affixing of the testator's name at the bottom of the will, either in his own handwriting or that of some one else by his direction.

Appeal from the Sullivan Circuit Court.

G. D. Burgess, for Appellants.

I. The paper propounded as the will of Henry Catlett, deceased, was not written in his presence nor by him, nor was the same signed by him or any person, by his direction, in his presence, as required by the statute. (Wagn. Stat., 1364, § 3; Rigg vs. Wilton, 13 Ills., 18; Dunlap vs. Dunlap, 10 Watts, 153; Northcutt vs. Northcutt, 20 Mo., 268.)

Our statute in regard to the manner of executing wills is mandatory, and a will not executed in conformity with the act is void. (McGee vs. Porter, 14 Mo., 611; see also Ruoff's Ap-

peal, 26 Penn. St., 219; Stricker vs. Graves, 1 Whart., 395; Ramsey vs. Ramsey, 13 Gratt. [Va.], 664; 2 Greenl. Ev., § 347; Public Adm'r vs. Watts, 1 Paige Ch., 347; Northcutt vs. Northcutt, 20 Mo., 268; Selden vs. Coalter, 2 Va. Cas., 553; note with last case, no. 29, pages 211 & 212, § 12; 1 Red. Wills [2d Ed.] § 12, *supra*.)

The cases of *Armstrong vs. Armstrong*, 29 Ala. [N. S.], 538; *Sarah Miles Will*, 4 Dana [Ky.], 1; *Converse vs. Converse*, 21 Vt. 168, so much relied on by the respondent, are cases where the will was written in the presence of the testators. The will in the case of *Selden vs. Coalter*, 2 Va. Cases, was also written in the presence of the testator. Where that is the case, there is perhaps some reason for saying, that it is properly executed, for then, although the will is written by another, the name of the testator is written in his presence and by his direction, and this might be considered as bringing it within the statute. But even this doctrine is denounced in the cases of *Selden vs. Coalter*, 2 Va., Cases 553; *Dunlap vs. Dunlap*, 10 Watts, 153; *Red. on Wills*, Vol. 1., pp. 211 & 212 [2 Ed.], § 12.)

It was immaterial under the statute of frauds, in what part of the will the testator's name was written, but the signature must have been made with the design of authenticating the instrument. (2 Jarm. Wills, 115; *Waller vs. Waller*, 1 Grat., 454.)

Alex. W. Mullins and George W. Easley, for Respondent.

I. The material inquiry in the case at bar is: What will amount to a sufficient signing by the testator?

In seeking the proper construction of the word *signed*, we are greatly aided by the adjudications that immediately followed the first enactment of the statute in England. In *Lemayne vs. Stanley*, 3 Levinz. 1, the will was written by the testator, who commenced it as follows: "I, John Stanley, make this my last will and testament," etc. He sealed, but did not sign it at the bottom. It was subscribed by the requisite num-

ber of witnesses, in his presence. This was held to be a sufficient signing. And in *Morrison vs. Turnour*, 18 Ves., 183, Lord Eldon is said to have observed, "that the decision in the case of *Lemayne vs. Stanley*, could not be sustained, unless you add one or two circumstances; either that the witnesses were present when he, the testator, was writing the will, which Lord Hardwick observes was not a natural presumption; or, if they were not present, that he acknowledged it to be in his writing when he called them in to attest; certainly expressing his opinion that such acknowledgment would do." (1 Pow. on Dev. 75, note 9.) With this modification, *Lemayne vs. Stanley* has been accepted as the law in the following among other English cases: *Hilton vs. King*, 3 Lev., 86; *Grayson vs. Atkinson*, 2 Ves. Sr., 454; *Coles vs. Trecothick*, 9 Ves., 249; *Morrison vs. Turnour*, 18 Ves., 183. See also the following authorities: 2 Greenl. Ev., § 674; 1 Jarm. on Wills, 70, 112, &c., of 2 Am. Ed.; 1 Williams on Ex. 56 to 63; 3 Greenl. Cruise, [2d. Ed.] 51; Tit. 38, c. 5, § 10; *Id.* p. 55, §§ 17, 18, n. 1; *Cravens vs. Falconer*, 28 Mo., 19.

The construction of the word *signed*, as required by the Statute of Frauds, as settled by the British Courts at the time of the adoption of our Statute of Wills, is that, if the party making such paper for the purpose of authenticating the same, writes his name, either by his own hand or the hand of another, or adopts one written or printed by another, in any part of the paper, this is a sufficient signing; and the construction of the statute by the British decisions, before the adoption of our statute ought to be regarded as the construction which our legislature intended to be put upon our own. (*Armstrong vs. Armstrong*, 29 Ala., [N. S.] 538.) And the doctrines of the English cases before 1838, have been followed by others of the American Courts. (*Selden vs. Coalter*, 2 Va. Ca., 553; *Sarah Miles' Will*, 4 Dana [Ky.], 1; *Converse vs. Converse*, 21 Vt., 168, 286.)

It is a point well settled, that if the name of the party appears in the memorandum, and is applicable to the whole substance of the writing, and is put there by him or his au-

thority, it is immaterial in what part of the instrument it appears; whether at the top, in the middle or at the bottom. (*Cleason vs. Bailey*, 14 Johns., 486; see also *Browne Frauds*, § 376; 4 Kent's Com., 511, page 687 [11th Ed.], note b.)

II. It was not an insuperable objection to the will, that testator's name was not written in his presence. (*Schneider vs. Norris*, 2 Maule & Selw., 286; 8 Esp., 181; 2 Bos. & Pull., 238.)

III. When a will is not written by the hand of the testator, and his name is not subscribed thereto, the material question is, whether he intended the paper to operate as his will without any further execution? Did Catlett contemplate the further signing of the will? Evidently he did not. It will be noticed that Catlett followed carefully Miller's instructions, as conveyed to him by Judge Davis. These instructions impressed upon Catlett the necessity of the attestation of the two witnesses; but did not contain the least intimation to direct Catlett's mind to the fact that he ought to sign the will himself. And the fact that Catlett called upon Davis and Yoho to witness the will, is wholly inconsistent with the idea that he intended to sign it himself, at some future time.

Catlett declared the paper to be his will; had it witnessed by his neighbors; handed it to his father-in-law, with directions to him to have it conveyed to Mrs. Catlett, which was done, and the paper put away in a secure place; and so far as the evidence shows, was neither spoken or thought of after that by Catlett, who died entertaining the belief that he had formally made his will, a belief that was shared in by his family, neighbors and friends.

But the opponents of this will may say that the will is incomplete on its face, because Miller added the clause, "In witness whereof," &c. And it is true that this clause does furnish some evidence of an intention to formally sign it, but it is only slight evidence of such intention, and may be rebutted by any other evidence which will show that no such intention, in fact, existed. Sarah Miles' will concluded: "In ratification of which, I have hereunto set my hand and affixed

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my seal," &c. (4 Dana, 1); see also *Medling vs. Pace*, 14 Ga., 596, cited in 14 U. S. Dig., 594, §§ 84, 90; 1 Williams Ex., 61, and the authorities collected.

VORIES, Judge, delivered the opinion of the court.

Henry Catlett died at the county of Sullivan, on the 30th day of October, 1872, without issue. He left surviving him, among the plaintiffs his brothers and sisters, and his wife, the defendant. He left the following instrument of writing, purporting to be his last will and testament: "I, Henry Catlett, of the county of Sullivan, in the State of Missouri, do make and publish this, my last will and testament: "1st. I, give and bequeath, to my beloved wife, Hester Druzilla, to have and to hold in fee, all my lands and tenements and hereditaments, with the appurtenances, whereof I am seized, situate, lying and being in the county of Sullivan and State of Missouri, and described as follows to-wit: The south (1-2) one-half of the south-east (1-4) one-fourth, and the north (1-2) one-half of the south-east (1-4) one-fourth, of section (11) eleven, township (62) sixty-two, and Range (20) twenty, being in all, (160) one hundred and sixty acres, more or less. In addition to the above, I also bequeath to my wife, Hester Druzilla, all my monies, credits and chattels, of every description; to have and hold or to dispose [of] at will. And I hereby appoint my wife, Hester Druzilla, executrix of this my last will and testament. In witness whereof I have hereunto set my hand, this 24th day of October, A. D. 1872. "Signed, published and declared, by the said Henry Catlett, as, and for, his last will and testament, in presence of us, who, at his request, have signed as witnesses to the same, in his presence, and in the presence of each other.

WILLIAM W. DAVIS.

JAMES W. YOHIO."

This paper was presented for probate, to the Hon. James Beatty, Judge of Probate for Sullivan county, on the 27th day of November, 1872; and was admitted to probate on the evidence of the subscribing witnesses, and a certificate thereof granted, on the third day of December, 1872.

This action was brought on the 26th day of February, 1873, by the plaintiffs, in the Circuit Court of Sullivan county, to contest the validity of said will, on the sole ground that the same was not executed in conformity with the statute. The cause coming on for trial at the October Term, 1873, of said Circuit Court, an issue was made up, whether the writing produced was the will of said Henry Catlett, or not; and such issue was submitted to a jury. The defendant to sustain the issue upon her part, introduced as a witness, Judge William W. Davis, who testified as follows: (The paper produced as the will of Henry Catlett being shown him,) "The signature to this paper, William W. Davis, is mine. I signed my name there at the request of Henry Catlett, deceased. He asked me to do so to witness that this was his last will and testament. Mr. Catlett was then at home, at his residence, lying on his bed, in the west room. I was in the same room, when I signed the will, perhaps in two feet of his bed. Jacob Potts, and his wife, (Mrs. Catlett's mother,) Mrs. Mary Couch, Susan Ann Gibson, and James W. Yoho, were also present when the will was signed. When I first went to Catlett's that day, he told me that he wanted to make a will, and wanted me to write it for him. I advised him to have it done by a lawyer, and told him, that if he desired to make a will, and would tell me how he wanted it, that I would get a lawyer in Milan to write it for him. He said he would do that. He then told me how he wanted the will made; that he wanted all of his property willed to his wife; that he wanted her to have it. I came to Milan, and went into Miller's office, and told him what Catlett wanted; who he wanted his property to go to, and how he wanted his will made; and Mr. Miller wrote this paper, which I took directly to Henry Catlett, and told him that I had the will for him; and that I would read it to him, to see whether it suited him, or not. I then read this instrument in his hearing and he said it was exactly as he wanted it. I told him that Mr. Miller said it would have to be witnessed by two witnesses, and about that time James W. Yoho, who was about

to leave the house, and about the time he was at the door of the room we were in, was called by Catlett who said: 'James, I want you to witness this will.' He then asked me to witness it, and both Yoho and I witnessed it. Yoho occupied about the same place when he signed the will, that I did when I signed it. The distance may have been as much as six feet from the bed. I am not positive as to the distance—it was on that side of the room next to the bed. There was no obstruction between Catlett and Yoho and myself when we signed the will. At that time Catlett was tolerably weak—able, though, to be up and go round the house. He was sitting up when I went there that day. Mr. Catlett's age was about thirty—not far from that. He was then of sound mind, and as rational as I ever saw him. After we had witnessed the will, it was left there, perhaps with his wife, Hester D. Catlett. When Catlett first commenced talking to me about the will, he gave me his reasons for it. The defendant's attorneys then asked the witness to state what it was the testator said? To which the plaintiff's attorney objected, and the objection was sustained, &c. On cross examination, the witness stated: Mr. Miller wrote the will at his office here in town, and Catlett was at home, one and a half miles away. Miller was not there nor was Catlett in town. Catlett lived a few weeks after the making of the will.

James W. Yoho was next introduced by the defendant, and testified as follows: "The signature of James W. Yoho, on this paper, is mine and in my hand writing. I was at Henry Catlett's house (the person named in this paper as testator,) when I wrote my name to the paper. I was requested by Catlett to put my name there as a witness. Catlett said he wanted me to write my name as a witness to the will. I don't think I was over one and one-half or two feet from Catlett when I signed. I can't just say whether he was sitting up when we signed or not; but he was out walking round the house when I went there. There was no obstruction between Catlett and me. "I think I was leaving, and had got to the door, when Catlett called me back and asked me to sign

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it as a witness. Heard Judge Davis read the will over to Catlett, and Catlett said that was his will—that was the way he wanted it. I had gone there after some time and Judge Davis came from town, and what I have related then passed and I went home. His mind was about as good as it ever was; it was sound.”

Mrs. Mary Couch was next sworn as a witness, and testified as follows: “I was at Catlett’s when Judge Davis brought the will. I was there when Mr. Davis and Mr. Yoho signed it. I heard Mr. Catlett ask Mr. Yoho to stay, and then Judge Davis asked Mr. Catlett if that was his will; if it was written the way he wanted it, and he said it was. I saw it in Mr. Davis’ hand, and saw Mr. Yoho sign it; saw Mr. Davis hand the will to Mr. Catlett, and Mr. Catlett hand it to Mr. Potts, and told him to give it to Hester, meaning his wife. I was not in the room all the time after Judge Davis brought the will.”

Mrs. Susan Gibson testified as follows: “I was at Mr. Henry Catlett’s the day Judge Davis brought the will over there. I was in the room when Judge Davis was reading the will. When he read it, he handed it to Mr. Catlett, and asked him if that was the way he wanted it, and Mr. Catlett said it was just right. I saw Judge Davis and Mr. Yoho sign it. He asked Mr. Yoho to stay and witness the will. Mr. Yoho was about starting home when Mr. Catlett asked him to stay. Judge Davis and Mr. Yoho, when they signed, were in Mr. Catlett’s presence—only a few feet from him.”

J. H. Couch testified as follows: “I was acquainted with Henry Catlett. I had a conversation with him before his death about—weeks, he told me that he intended that his wife should have his property, and that he intended to make a will to that effect. This was in July before his death; he died in October, 1872.”

Aaron Glidewell was next sworn, and stated that “during the year 1871, he was at Mr. Couch’s, stacking grain, and heard Henry Catlett, now deceased, say that he intended to fix things so that his wife would get all of his property after

his death. I was then stacking and he was pitching. Catlett was a consumptive man."

Hester D. Catlett was next introduced as a witness in her own behalf, and testified as follows: "I was at home the day my husband, Henry Catlett, made his will, I was not in the room where he was at the time that the witnesses, Judge Davis and Mr. Yoho, signed the will. My father, (Mr. Potts,) conveyed it to me, and I kept it in a box until it was sent to the Probate Court. This paper (the will produced) is the one given me by my father, and the one I kept."

The defendants next offered to read, by way of producing it before the jury, the foregoing paper, as the last will and testament of Henry Catlett deceased. To the reading of which said instrument of writing to the jury, the plaintiffs, by their attorney, at the time objected, for the following reasons, to-wit: Because the same had never been signed by Henry Catlett, or by any person by him directed in his presence. Because the same had never been executed by Henry Catlett. Because the same was illegal, irrelevant, and not competent testimony for any purpose. Which objections were overruled, and said paper read to the jury, and exceptions properly taken.

This was all the evidence offered. Whereupon the plaintiffs asked an instruction in the nature of a demurrer to the evidence, which was refused by the court, and exceptions saved. The court then gave the following instruction on behalf of the defendant.

First. Although the jury may believe from the evidence that Henry Catlett did not write his name to the paper here produced as his will, either at the bottom, or in any part thereof; yet, if the jury believe from the evidence that the said Henry was on the 24th day of October, 1872, over the age of twenty-one years, and was then of sound mind, and that on that day the said Henry requested the witness, Davis, to have the will written for him, and that the said Davis did, in pursuance of such request, procure Miller to write said will, and that after the same was written, the said Davis read the

same in the presence and hearing of the said Henry Catlett, and that the said Henry then and there adopted the same, and requested the witnesses, Davis and Yoho, to sign the same as subscribing witnesses thereto, to attest the fact that he had executed said will, and that they did so, and that the said Henry then and there published the said paper to be his will, then the jury will find the issue for the defendant.

* * * * *

Whereupon the plaintiffs took a non-suit with leave, and afterwards within the proper time filed their motion to set aside &c., which being overruled, they saved the foregoing exceptions and appealed.

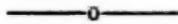
It will be seen from the foregoing statement of the case, that the only question presented for consideration is, whether the paper presented for probate as the last will and testament of Henry Catlett, has been executed in a manner to give it effect as a will, under the provision of our statute concerning Wills.

The statute provides, that "Every will shall be in writing signed by the testator, or by some person by his direction in his presence, and shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator." (Wagn. Stat., 1864, § 3.) No will, not executed in the manner prescribed in the above section, can be valid, except in a few special cases provided for in the statute, which need not be named as they cannot affect this case. It is not pretended that the paper exhibited in this case as the will of Henry Catlett, was signed or subscribed by him at the conclusion or bottom of the writing in the usual way; but it is contended that it is a sufficient compliance with the statute if his name appears in any place in the instrument, either by the way of the usual exordium at the commencement of the will, or otherwise in body of the instrument. There is no doubt but the English courts, out of an extreme anxiety to sustain wills and to evade the statute of frauds, where the wills devised real estate, have held in numerous cases, that it was a sufficient signing of the will under the statute of frauds, that the name of the testator should appear in the body or

commencement of the will. These decisions have been followed in most of the States in this country. It could serve no valuable purpose to refer to the numerous decisions on this subject, as they are familiar to every intelligent member of the profession. Justice Kent in his commentaries on this subject says: "The English courts, from a disposition to favor wills, departed from the strict construction and obvious meaning of the statute of frauds, and opened a door to very extensive litigation. It was held to be sufficient that the testator wrote his name at the top of the will by way of recital; and such insertion of his name was deemed signing the will within the statute of frauds." (4 Kent's Com., p. 631.) Also in Jarman on Wills, it is said: "It was immaterial under the statute of frauds in what part of the will the testator's name was written, and where the whole will was in the testator's handwriting, the name occurring in the body as the usual exordium "I. A. B. do make, etc.," was decided to be a sufficient signing. But the signature, whatever was its local position, must have been made with the design of authenticating the instrument, for it would seem that if the testator contemplated a further signature which he never made, the will must be considered as unsigned." It has been held in the cases on the subject, with a very few exceptions, that in order to the validity of a will where it is not subscribed at the conclusion or foot of the instrument, but only appears at the commencement or in the body of the instrument, the will must, in order to its validity, have been in the handwriting of the testator, and he must have intended the signature, wherever inserted, to be the authentication of the instrument, and have contemplated no further signing. With this view of the case it is difficult to see how this will could be upheld under the statute of frauds as construed by the course of decisions referred to; for the will in this case was not in the handwriting of the testator, and by the words at the conclusion of the instrument "in witness whereof I have hereunto set my hand this 24th day of October, A. D. 1872," it was clearly contemplated, that a different signing was intended besides the

formal recital of his name at the commencement of the instrument. But it must be also recollected that in the execution of wills in this State, the statute of frauds is not the only statute to be kept in view; but in order to the validity of a will the statute in reference to wills must also be complied with. The 3d section of the statute before referred to, (Wagn. Stat., 1364) provides that every will shall be in writing, signed by the testator or by some person by his direction, in his presence, and shall be attested by two or more competent witnesses, etc. It is not pretended in this case, that the will was signed by the testator either at its conclusion or elsewhere, nor is it pretended that the will was ever written in his presence; but is clear that the will was written by an attorney, at his office, at the request of a friend of the deceased. Now if we should admit that the name of the testator, as recited at the commencement of the instrument, would be a sufficient signing if made in the handwriting of the testator, would the will even then be good, under the statute, when written by another and not in his presence? In other words, is the direction of the statute requiring a will which is signed by another person for the testator, to be so signed at the request of the testator and in his presence, imperative; or may the will signed out of his presence, and at the request of another be adopted by the testator and thereby become valid? In order to answer this question, it will be proper to refer to former decisions of this court, on questions somewhat similar in principle. In the case of *McGee vs. Porter*, the paper attempted to be probated as the last will of McGee, had been executed under the law then in force, in which there was a provision which required that "every person who shall sign the testator's name to any will by his direction, shall subscribe his own name as a witness to such will, and state that he subscribed the testator's name, at his request;" it was held by the court, that this provision of the statute was mandatory, and if the will was not so witnessed by the person subscribing the testator's name to the instrument at his request, the will so attempted to be made, was void. The same point was de-

cided, and in the same way, in the case of St. Louis Hospital Association vs. Williams, 21 Mo. 17, and in Northcutt vs. Northcutt, 20 Mo. 266. It would be difficult to see how the attestation of a fact should be mandatory and essential, while the fact itself would not be essential to the validity of the will. But we do not rest this case entirely on the ground that the will was not written and the testator's name inserted therein in the presence of the testator. We believe that the proper and rational construction of the statute is that the will should be signed by the testator; that the words in the statute requiring the will to be signed by the testator, or by some person by his direction and in his presence, means that the instrument as written shall be subscribed by affixing the name of the testator in the usual way of executing other instruments of writing; and that not only must the statute of frauds be complied with, but that the statutes concerning Wills must also be complied with; and that the words of the statute should be construed by their ordinary import and meaning, as our statute requires. With the views above expressed, the judgment must be reversed and the cause remanded, when a proper judgment can be rendered in the cause. The other judges concur.



**BENJAMIN F. JONES, Respondent, vs. THE ST. JOSEPH FIRE
& MARINE INSURANCE COMPANY, Appellant.**

1. *Practice, civil—Records may be amended nunc pro tunc, when.*—After a case has been appealed to the Supreme Court, the Circuit Court has power to amend its records by entries *nunc pro tunc*. (De Kalb Co. vs. Hixon, 44 Mo., 341.)
2. *Practice, civil—Motion for new trial—Action of court on—When discretionary.*—It is a matter resting in the discretion of the court to overrule a motion for new trial, based upon the allegation, that at the day of the trial one of the attorneys had just died, and his partner was so ill as to be unable to attend court.
3. *Practice, civil—Jury—Waived when—Const. Stat.*—Where neither defendant nor his attorneys are present on the day set for trial, the court may, although

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answer has been filed, proceed to try the case *ex parte*, without a jury. In such case a jury is held to be waived. (Wagn. Stat., 1041, § 14.) Filing of an answer is not an "appearance" as meant by that statute.

4. *Insurance—Allegations, as to value and loss—What sufficient, after verdict.*—In suit upon a fire insurance policy the petition alleged that defendant insured plaintiff to the amount of \$1200, on certain property described; and that the property was totally destroyed by fire. *Held*, that the averments of value and loss, were sufficient after verdict.

Appeal from Clinton Circuit Court.

B. R. Vineyard, Judson and Bernard, for Appellant.

I. The petition nowhere alleges the value of the property destroyed, or that it was of any value whatever, or that the plaintiff sustained any loss, or that the destruction of said property so insured was any damage or loss to plaintiff.

II. The court without the intervention of a jury had no authority to try and determine the matters in controversy in this case. (Wagn. Stat., 1040, § 12.) The defendant had filed an answer pleading to the merits. This was an "appearance" as meant by the statute. (Wagn. Stat., 1041, § 14; *Benton vs. Lindell*, 10 Mo., 557; *Pratt vs. Carl*, 9 Mo., 164.)

III. After an appeal taken from the Circuit Court the record cannot be changed or altered by either party, nor can an entry be made *nunc pro tunc*, and no addition can be made to the record. (*Stewart vs. Stringer*, 41 Mo., 400; *Ladd vs. Cousins*, 35 Mo., 513.) The *nunc pro tunc* judgment entered in the court below, was made without the introduction of any evidence whatever. Several terms of the Circuit Court had intervened, and to correct the judgment without evidence, was a usurpation of power and authority on the part of the trial court, unwarranted by law. (*Saxton vs. Smith*, 50 Mo., 490; *Gibson vs. Chouteau*, 45 Mo., 171.)

Wm. Henry, for Respondent.

I. The appellant waived its right to a trial by jury by failing to appear at the trial of the case. (Wagn. Stat., 1041, § 14.)

II. This court will not interfere with the discretion of an

inferior court in refusing to set aside a judgment, after a trial at which the defendant failed to appear, except in a very plain case. (*Brolaski vs. Putnam*, 34 Mo., 459; 40 Mo., 178.)

III. There can be no advantage taken of the petition now. The point was not raised in the Circuit Court, and it is good after verdict; the defects in the allegations of damages, etc., being cured by intendment of law. (*Steph. Pldgs.* 8 Am. Ed., 148-9; *Richardson vs. Farmer*, 36 Mo., 35; *Powell vs. Reynolds*, 51 Mo., 154; *Bowie vs. Kansas City*, 51 Mo., 454.)

IV. It cannot be doubted, that the *nunc pro tunc* entry might properly be made by the Circuit Court (*Mann vs. Schroer*, 50 Mo., 306; *Priest vs. McMaster*, 52 Mo., 60; *Gibson vs. Chouteau's heirs*, 45 Mo., 171); and it makes no difference that the correction of the record was made after the appeal to this court. (*DeKalb Co. vs. Hixon*, 44 Mo., 341, and authorities there cited.)

NAPTON, Judge, delivered the opinion of the court.

Since this case came here by appeal, an amendment *nunc pro tunc* of the judgment originally entered was made in the Circuit Court, correcting errors in the original entry made by the clerk. This was done on motion after due notice to the opposite party; and the correction having been ordered and made, we will presume that the court had sufficient evidence in its records to authorize the change in the entry; and the objection now taken, that the court had no power, after the case was brought here by appeal or writ of error to make an entry *nunc pro tunc*, has been heretofore considered and determined otherwise by this court, on the authorities cited. (*DeKalb Co. vs. Hixon*, 44 Mo., 342.)

The action was on a policy of insurance to recover the amount insured on account of the destruction of a house by fire. An answer was filed to the petition, and a replication filed to the answer, but on the day set for the trial the de-

defendant did not appear and the case was tried by the court *ex parte* plaintiff, and a verdict given and judgment for the plaintiff. Subsequently a motion was made by the defendant to set aside this verdict, on the ground that one of the defendant's attorneys died shortly before the term of the court, and his partner was sick at his home in Chillicothe at the day of trial, and could not attend to the case, but the court overruled the motion. It was also urged, that the court had no power to try the case, as the defendant did not waive his right to a jury. Both grounds were decided insufficient and a new trial refused. The defendant also moved in arrest on the ground that the petition did not state any cause of action, which was also overruled, and the case is brought here for review.

It was a matter of discretion with the court to set aside the verdict, for the causes alleged in the affidavits and motion of defendant, and we cannot see that it was improperly exercised. It does not appear that there would have been any difficulty in defendants employing other counsel. In regard to the waiver of a jury trial the statute seems to be very plain. Sec. 14 says, "parties to an issue of fact shall be deemed to have waived a trial by jury in the following cases: First, by failing to appear at the trial," etc. The cases of *Benton vs. Lindell*, (10 Mo., 557,) and *Pratt vs. Carl*, (9 Mo., 164;) are decisions under our statutes when they were materially different from the present. As to the motion in arrest on account of the petition not stating facts sufficient to constitute a cause of action, it was properly overruled.

The objections to the petition are, that it nowhere alleges the value of the property insured, or that it was of any value, or that its destruction was any damage to plaintiff. The petition alleges that defendant undertook to insure the plaintiff against any loss by fire to the amount of \$1200, on certain property described, and that by said policy the defendant promised to make good unto plaintiff all such loss and damage sustained by plaintiff as should happen by fire to the property insured, to be paid within sixty days after proof of

loss and due notice. It is further stated that on the 20th of October, 1871, the said property so insured by defendant and at said date owned by plaintiff was totally destroyed by fire. That he forthwith gave notice, etc., and delivered a particular account of loss, etc., and performed all the conditions on his part to be done, etc.,

These averments of value and loss would seem to be sufficient after verdict. That the property insured was totally destroyed by fire would seem to be a distinct averment of loss to the amount of the value of the property. That an insurance was given on this property to the amount of \$1200, would strongly imply that, at least in the estimation of the underwriters, it was at least worth as much as that or more.

We think the petition good after verdict, and therefore affirm the judgment. The other judges concur.



JOHN HIGGINS, Defendant in Error, *vs.* DENNIS C. HIGGINS,
Plaintiff in Error.

1. *Pre-emption in another's name in fraud of statute—Resulting trust—Equitable relief, when granted.*—Where one enters land which he cannot legally enter in his own name, in the name of another, in evasion of the law, no trust will result in his favor and equity will grant him no aid.

Error to Davies Circuit Court.

M. A. Low, for Plaintiff in Error.

I. The petition shows that John Higgins could not have legally entered the land in his own name, and the entry was made in his son's name to evade the pre-emption laws of the United States. No resulting trust can be set up, if it would break in upon the policy of the law, or a public statute. (*Miller vs. Davis*, 50 Mo., 572; *Alexander vs. Warrance*, 17 Mo., 228; *Baldwin vs. Campfield*, 4 Halst. Ch., 891; *Ex parte Yallop*, 15 Ves., 60; *Ford vs. Lewis*, 10 B. Mon., 127; *Cottingham vs. Fletcher*, 2 Atk., 156; *Muckleston*

vs. Brown, 6 Ves., 68; 1 Sto. Eq. Jur., § 294; Cooth vs. Jackson, 6 Ves., 12.)

Milt. Ewing, for Defendant in Error.

I. The petition does not show that the father entered the land in the name of the son, for the purpose of evading any act of Congress.

II. The petition is sufficient after verdict.

III. Where a father purchases or enters land in the name of his son, although the presumption is, that it was intended as an advancement to the son, yet that presumption may be rebutted by testimony.

VORIES, Judge, delivered the opinion of the court.

This action was brought in the Davies Circuit Court, to divest the title in and to a tract of land out of the defendant and to vest the same in the plaintiff.

The petition is as follows :

"Plaintiff states, that on the——day of August, A. D. 1855, he purchased and entered at the land office of the United States at Plattsburg, Missouri, the following lands, to-wit: The South-East Quarter of the North-East Quarter of Section thirty-five, of Township sixty-two, of Range twenty-eight, in the County of Davies and State of Missouri, containing forty acres, at the price and sum of fifty dollars, in the name of the defendant, a child of the plaintiff, now aged about sixteen years.

"Plaintiff further states, that at the time he entered said land, that he had filed his pre-emption claim thereon and doubts arose as to the validity of his pre-emption; and one Dennis Clark was about to enter the land and take it from the plaintiff, and as plaintiff could not enter until the time of proving his pre-emption on said land expired, in order to make sure of the land and avoid a law suit with the said Clark, in relation to the same under his pre-emption, he purchased the same in the name of the defendant.

"Plaintiff further states, that he has recently removed with

his family, including defendant, to the State of Iowa, from his former residence in Davies County, Missouri, and having sold out in this county, he desires to sell this land also."

He then prays for a decree divesting the title to the land out of defendant and vesting it in plaintiff, &c.

The defendant was served with process and afterwards, a guardian *ad litem*, was appointed for the infant defendants. The record shows that the guardian filed an answer, but none appears in the record; but no objection is taken by the parties to the record on that account. Afterwards, at the November term, 1866, of the court, the case was heard by the court, and a decree rendered in favor of the plaintiff. The court in the decree finds each and every fact stated in the petition to be true. There is no bill of exceptions, and no exceptions appearing on the record, so that nothing can be examined in this court but the petition and decree, and if no error appears in them, the judgment should be affirmed.

It is admitted by the parties, that the writ of error was sued out within three years after the defendant arrived at the age of twenty-one years. It is insisted by the defendant, that it is shown by the petition, that the plaintiff could not have legally entered the land in his own name, and that the entry was made in his son's name to avoid the pre-emption laws of the United States, and that in such case, no trust would result in his favor. The petition states, that the plaintiff had made a pre-emption on the land; that it was doubtful whether his pre-emption was valid; that one Clark was threatening to enter the land, and that, as plaintiff could not enter the land in his own name until the time for proving up the pre-emption expired, in order to make sure of the land and avoid a lawsuit with Clark in relation to his pre-emption on the land, plaintiff entered and purchased the land in his son's name. The plaintiff admitting that he had entered the land in defendant's name, in evasion of the law, in order to defeat the claims of Clark to the land, when by the law he could not have entered it in his own name, no trust can result in his favor; and a court of equity will not interfere to help him out of the dif-

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fiently in which he has placed himself in violation of law. This case cannot be distinguished from the case of *Miller vs. Davis*, 50 Mo., 572.

The judgment will be reversed. The other judges concur.

—o—

MARTHA A. DAVIS, *et al.*, Respondents, *vs.* HOLMES AND ELLIOTT, Appellants.

1. *Mortgage—Redemption—Sale of equity of—Sale of title—Foreclosure, etc.—*

Mortgaged lands having been sold by the mortgagee, it was decreed by the court that the mortgagor might redeem on payment of the purchase money and the value of the improvements, etc., and on failure to redeem the court ordered sale of the equity of redemption, and after deducting expenses of sale and costs and payment of amounts due the mortgagee and purchaser at the mortgage sale, for improvements, payment of the surplus to the mortgagor. *Held*, that the decree, although not asked for by the mortgagee was proper, except that the whole title should have been sold instead of merely the equity of redemption. A strict foreclosure under the English practice, is foreign to ours and therefore improper.

Appeal from Andrew Circuit Court.

Herron & Rea, Strong's & Hedenberg, and Bennett Pike, for Appellants.

I. Plaintiffs had no right to redeem. The money due on the note and mortgage was paid. (Curtis Eq. Prac., 404; *Thornton vs. Irwin*, 43 Mo., 160, 161; *Bollinger vs. Chouteau*, 20 Mo., 89, 95; 4 Kent's Com., 186; 4 John. Ch., 140.) There was no application to redeem alleged in the petition, nor proved on the trial, before the institution of the suit. (2 Hill. Mort., 53, § 18; 6 Am. Law Reg., 508; 29 Me., 302.)

An attempted sale by the mortgagor under a power in a mortgage by which no title to the premises passes, is an equitable assignment of the mortgage debt and the interest in the mortgaged premises. (*Grosvenor vs. Day*, 1 Clark Chy., 109; *McSorley vs. Larissa*, 100 Mass., 270; *Robinson vs. Ryan*, 25 N. Y., 329; *Johnson vs. Houston*, 47 Mo. 227.)

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II. Even if a sale under the circumstances of the case were proper, the decree is erroneous in ordering only the sale of the equity of redemption of respondents in the premises. The order of the sale should have gone to the whole title.

Allen Vories, for Respondent.

I. Unquestionably respondent could redeem, and courts of equity in such cases must adapt their decrees to the case before them, and render substantial justice. The relief should vary with the circumstances. (*Thornton vs. Irwin*, 43 Mo., 167.) In Vermont, the practice is to fix a time when the money due on the mortgage shall be paid, and to decree a foreclosure on failure to make such payment. (*Smith vs. Bailey*, 10 Vermont, 163.) The practice in Maryland and Virginia is, to decree that the mortgagor shall pay the debt by a given time, and if not paid then, that the mortgagor be forever foreclosed of all equity of redemption, and the mortgaged premises be sold. (See *Turner vs. Turner*, 3 Munf., 66; In North Carolina, *Ingman vs. Smith*, 6 Iredell, Eq. 97.) So in Kentucky (See *Butt vs. Bondurant*, 7 Monroe, 421), and in other States. In others, strict foreclosure is practiced. This whole question is left to the sound discretion of the courts of chancery, and respondents contend that such discretion was not abused in this case, and that the decree rendered by the court below was the only one that would fully meet the case made, and do exact justice between all the parties. The doctrine of strict foreclosure in the Eastern States arises from special statutes.

NAPTON, Judge, delivered the opinion of the court.

This proceeding was instituted by the heirs of Fleming Davis to have certain sales and deeds of land mortgaged by said Davis, which had been made by the mortgagee Elliott, set aside as void, and to allow a redemption of the land by the plaintiff. The purchaser at these sales—Holmes—was also made a defendant. A great number of fraudulent practices and conspiracies are charged in the petition without the slight-

est evidence to sustain them. The result was, however, that the deeds to Holmes, the purchaser at the mortgagee's sale, were declared void; one of them, because sufficient notice of the sale was not given, and the other, because the sale was made in the absence of the mortgagee, by an agent or attorney in fact; and a decree was made fixing a time for the plaintiff to redeem, on the payment of a certain amount of money. This amount was ascertained by the court, on a calculation of the money paid by Holmes in his purchase from the mortgagee, and the rents and profits made by him on the land, after he took possession under his purchase, and the value of the improvements made by him. There is no objection to the propriety of the decree in this respect, but the decree then decided that if the plaintiffs did not redeem on the day named, the equity of redemption should be sold, and after deducting expenses of sale and costs, and the payment of the sum found to be due defendants, Holmes and Elliott, the remainder of the proceeds should be paid to plaintiffs. And this decree for a sale, on the contingency provided for, is the only point presented for our consideration. It is insisted, that the decree should have been for a strict foreclosure, if the money was not paid on the day named, and that the further decree for a sale of the land, or the equity of redemption, was wrong, no such decree having been asked by the defendant Elliott, the mortgagee. After some hesitation, we have concluded that the decree was right, except in ordering the equity of redemption to be sold, instead of the title.

A strict foreclosure, though common in some States, is a novelty in proceedings on mortgages here. The plaintiff may be unable to redeem, perhaps in consequence of the improvements, put by the mortgagee or the purchaser from him, on the land, and for which they have been allowed by the court in this case; yet if the land and improvements will overpay the debt of the mortgagor and the value of the improvements after deducting the rents and profits, the mortgagor or his heirs, are entitled to whatever surplus may result from a sale. If Elliott, the mortgagee,

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had alone been interested, the decree might have properly ordered a foreclosure of plaintiff's equity, on failure to pay the sum of money found to be due, since Elliott, the mortgagee, though a party defendant, and having still a claim against the land for a small part of the debt of plaintiffs, which the proceeds of the sale did not extinguish, did not in his answer ask to be secured by a sale of the land. But if the property is not redeemed, the mortgagee still holds his claim or debt against the mortgagor, and if the land will pay it he is entitled to be released from his personal liability. The improvements which the court allowed, and we think properly, were a mere lien on the land, and as the plaintiffs in order to redeem, had to pay for them, *minus* the rents and profits, their inability to do so, would not authorize a strict foreclosure of this equity of redemption. A sale would be necessary to ascertain whether the land would not, with its improvements, pay off the mortgage debt and the cost of improvements, and leave a surplus for the mortgagor. As the decree ordered a sale of the equity of redemption alone, it will be reversed, and the cause remanded.

The judgment should have been for a sale of the entire title. As the terms for redemption specified in the judgment have passed, the judgment may have to be altered in other particulars, and therefore we remand the case.

Judgment reversed and cause remanded. The other judges concur. Judge Vories not sitting; Judge Wagner absent.

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JOHN CLEMENTS, Respondent, vs. JOSEPH B. MALONEY, Appellant.

1. *Slander—Words charged must be proved, how far.*—In suit for slander, the same words, or enough of the same words set out in the petition to constitute the offense charged to have been imputed, must be proved in order to entitle plaintiff to a verdict. And it is not enough to prove different words of similar import.

2. *Practice, civil—Instructions should be taken as a whole.*—Instructions are proper, where, taken as a whole, they do not confuse or mislead the jury, and fairly present the law of the whole case.
3. *Slander—Circumstances of plaintiff, etc., may be taken into consideration.*—In suit for slander, it is proper to instruct the jury in estimating damages, to consider the circumstances of the plaintiff, including not merely his pecuniary condition, his family and the like, but all the circumstances of the case which give character to the slander and the injury occasioned thereby. And the jury may give punitive damages. (*Buckley vs. Knapp*, 48 Mo., 152.)
4. *Slander—Action of—Contract—Technical variance, effect of.*—In action of slander where a contract is referred to in the petition merely by way of preliminary inducement, the contract is not rendered inadmissible in evidence by reason of a technical variance between the instrument and the allegations of the petition, where the effect of such variance is not to mislead the jury. (Wagn. Stat., 1033, § 1.)
5. *Practice, civil—Probata and allegata—Variance, when and how taken advantage of.*—Where a party has been misled by reason of a variance between pleadings and proof, and fails to file his affidavit, setting forth in what respect he has been so misled, as provided in the statute (Wagn. Stat., 1033, § 1), he cannot avail himself of the objection in the Supreme Court.

Appeal from Sullivan Circuit Court.

A. W. Mullins, for Appellant.

I. In actions of slander, the slanderous words must be proved as charged; proof of equivalent words is not sufficient; so many of the *identical* words charged as are necessary to constitute in themselves the slanderous accusation, must be proved as laid. (*Birch vs. Benton*, 26 Mo., 153; *Creelman vs. Marks*, 7 Blackf., 281; *Fox vs. Vanderbeck*, 5 Cow., 515; 8 Phil., Ev., 551 & notes; 1 Hill. Torts, 397.)

II. The instruction as to the "circumstances" of the plaintiff was clearly erroneous. There was no evidence on the point. (*Wear vs. Hickman*, 4 Mo., 106; *Vaulx vs. Campbell*, 8 Mo., 224; *Rose vs. Spies*, 44 Mo., 20; *Id.*, 179; *Frantz vs. Hilterbrand*, 45 Mo., 121.)

III. There was a fatal variance between the contract and the allegations in the petition. (1 Hill. Torts, 396-398, and authorities.)

G. W. Easley and G. D. Burgess, for Respondent.

I. There was no variance between the contract read in evidence, the allegations in the petition, and the proof offered. (§ 1, Art. 3, Wagn Stat.; Reed vs. Larkin, 19 Mo., 192; Murphy vs. Wilson, 44 Mo. 313; Metz vs. Eddy, 21 Mo., 13; Randolph vs. Keiler, 21 Mo., 557.)

II. The instructions taken together presented the law of the case fairly to the jury, and they must be taken as a whole. (Sears vs. Wall, 49 Mo., 359.)

III. The rule as to the measure of damages as presented in the third instruction given for plaintiff. (Buckly vs. Knapp, 48 Mo., 163; Bump vs. Betts, 23 Wend., 85; McNamara vs. King, 2 Gilm., [Ill.] 432; 1st Hill. Torts, 405; Bennett vs. Hyde, 6 Conn., 24; Beehler vs. Steever, 2 Whart., 314; Larned vs. Buffington, 3 Mass., 546.)

VORIES, Judge, delivered the opinion of the court.

This was an action for slanderous words spoken.

The petition charged, that on the 1st day of November, 1870, plaintiff had in his possession a contract which had been previously entered into in writing between the defendant of the one part, and the directors of School District No. 7, in Township 61, of Range 21, Sullivan County, Missouri, on the other part, in regard to the building by defendant of a school house for said school district; and that said defendant on said 1st day of November, 1870, at Sullivan county aforesaid, in speaking of said contract in the presence and hearing of one Sherwood and others, spoke the following false and slanderous words of and concerning plaintiff, that is to say: "John Clements (meaning plaintiff) forged the words, 'that he (plaintiff) should pay him (defendant) four hundred dollars on or before the 15th day of September, 1870, or as soon thereafter as the same could be collected off of said district, and that he could prove it by twenty-five men.'" That he, John Clements (meaning plaintiff), forged the words, "That the work was to be done in a workmanlike manner in the contract;" thereby intending and was so understood by those present, to charge the plaintiff with the crime of forgery, by which plaintiff claims that

he has been damaged in the sum of one thousand dollars, for which judgment is prayed. The defendant filed two answers to this petition, but the one upon which the trial seems to have been had, simply denies that plaintiff, on the 1st day of November, 1870, or at any time, had in his possession a contract which had been entered into between the defendant and the directors of School District 7, in Township 61, of Range 21, in Sullivan County, in regard to the building by the defendant of a school house for said district, and denies, that on said day or any day prior or subsequent thereto, he charged the plaintiff with the crime of forgery as set forth in the petition. The evidence introduced by the parties on the trial of the cause tended to prove the issues on their respective parts.

Among other proofs introduced by plaintiff, was what purported to be the written agreement referred to in the plaintiff's petition, and together with said instrument, plaintiff offered to prove by oral testimony, that the agreement offered in evidence was the same instrument to which defendant referred in making the charges against plaintiff, which are set forth in the petition, and which had been referred to by the witnesses in the cause. The defendant objected to the reading of the instrument in evidence, and also to the oral evidence identifying the instrument as the one referred to by defendant, on the ground that there was a variance between the instrument offered in evidence, and the one referred to by plaintiff in this, that the instrument referred to in the petition was described as executed by the defendant on the one part, and the School directors of School District No. 7 on the other part, while the agreement offered in evidence purported to have been executed on the part of the school directors of school district No. 8, and was only signed by the plaintiff as director of said district. The court overruled the objections to this evidence, and the defendant excepted. At the close of the evidence the court, at the request of the plaintiff, instructed the jury as follows:

1st. "That if the jury believe from the evidence, that defendant and plaintiff did on or about the first day of April,

1870, enter into a contract in regard to the building of a school house and placed the same in the hands of S. A. Maloney to hold for them, and that defendant afterwards, to-wit: on or about the first day of November, 1870, in the presence and hearing of one H. A. Atkins, in speaking of plaintiff and said contract, spoke of and concerning the plaintiff the following words, to-wit: That John Clements forged the words, 'that he should pay him four hundred dollars on or before the 15th day of September, 1870, or as soon thereafter as the same could be collected off of said district;' or that he substantially spoke of and concerning plaintiff said words, and that they were false, they are bound to find for plaintiff."

2nd. "If the jury find for the plaintiff, they will assess his damages at any amount to which they may believe from the evidence that he is entitled, not exceeding the sum of one thousand dollars."

3rd. "The jury in making their verdict may take into consideration all the facts and circumstances as detailed by the witnesses, and in estimating the damages which they may think plaintiff has sustained, may take into consideration his circumstances and the injury to his feelings, and may add thereto as compensation for the injury smart money."

4th. "If the jury believe from the evidence that defendant spoke of and concerning the plaintiff the words charged in the complaint, or substantially the same words and that they were false, then the law presumes that they were spoken wilfully and maliciously."

The defendant objected to these instructions and his objections being overruled, he excepted. The court then at the request of the defendant instructed the jury as follows:

1st. "That before the jury can find a verdict for plaintiff they must be satisfied from the evidence that the defendant spoke of and concerning the plaintiff the exact words mentioned in the petition, or enough of said exact words to make a material alteration of said contract, and that he charged plaintiff with making such alteration after the paper was executed; and the jury must exclude from their

consideration any and all other words that defendant may have spoken with reference to the plaintiff, not specified in the petition."

2nd. "It devolves upon the plaintiff to make out his case to the satisfaction of the jury, and unless the jury in this case can find that plaintiff has made out a case as specified in the instructions by a preponderance in his favor of the testimony adduced, then the jury ought to find for the defendant."

There were some other instructions given and refused, but they are not necessary to any real point raised in this court, and will not be further noticed.

The jury found a verdict in favor of the plaintiff for two hundred dollars. The defendant filed his several motions for a new trial and in arrest of the judgment, which being overruled by the court and a final judgment rendered on the verdict, the defendant again excepted and appealed to this court.

The first objection made by the defendant to the action of the Circuit Court, is as to the legality of the first and second instructions given to the jury by the court at the request of the plaintiff. The jury are told by said instructions, that if they find from the evidence that the defendant spoke the slanderous words set forth in the petition, of and concerning the plaintiff, or that he substantially spoke of and concerning plaintiff said words, and that they were false, they must find for the plaintiff. It is insisted by the defendant that these instructions are erroneous; that the identical words laid in the petition must be proved or at least enough of the words laid must be proved, to constitute the slanderous charge imputed or charged to have been imputed in the petition. There is no doubt but the proposition as stated by the defendant is correct. The same words or enough of the same words laid in the petition must be proved to constitute the offense charged to have been imputed, and it will not do to prove different words of similar import. (*Birch vs. Benton*, 26 Mo., 153; *Reeman vs. Marks*, 7 Blackf., 281, and other cases referred to.) The words charged in the petition and not the offense charged by the words must be substantially proved. (*Fox vs.*

Vanderbeck, 5th Cow., 513.) The instructions objected to, tell the jury that the words charged must be proved, or that defendant substantially spoke of plaintiff said words. The jury are not told by this language that they may find that he spoke words substantially constituting the charge of forgery; but they are told that they must find that the defendant substantially spoke the very words charged. There are numerous cases in which the law laid down in the instruction is stated in almost the exact language used in these instructions; but of course it would be more satisfactory for the court to tell the jury that enough of the words stated in the petition must be proved to substantially constitute the slanderous charge, charged to have been imputed to the plaintiff. In the instructions given by the court in this case at the request of the defendant, the court does tell the jury, that they must believe from the evidence that the defendant spoke of and concerning the plaintiff the exact words mentioned in the petition, or enough of the exact words to make a material alteration of the contract, and that charged plaintiff with making such alteration after the paper was executed, excluding from their consideration all other words spoken, not stated in the petition, before they could find for the plaintiff.

This certainly states the law as strongly in defendant's favor as he could desire it, and when taken in connection with the instructions given on the part of the plaintiff, amounts to a proper exposition of the law on the subject. It is very true that it will not always do for the court to give the jury instructions only embracing a partial view of the case, and tell the jury if they find the facts sustaining that view of the case, they should find for the plaintiff, and by another instruction presenting a different and partial view of the case tell the jury if they find the facts presented by that view of the case they must find for the defendant. Whenever such instructions are wholly inconsistent and contradictory, they are calculated to confuse the jury, and are pernicious and erroneous, however correct they may be in the abstract. But that is not the case with the instructions in this case; they are not, when

Clements v. Maloney.

properly considered, inconsistent, and when all taken together do not tend to mislead the jury, and fairly present the law of the case to the jury. (*Sears vs. Wall*, 49 Mo., 359; *Budd vs. Hoffheimer*, 52 Mo., 297.)

The next objection made by the defendant to the proceedings had in the Circuit Court is that the court improperly instructed the jury that if they found for the plaintiff in estimating his damages they might take into consideration all of the facts and circumstances detailed by the evidence, and that they might take into consideration the circumstances of plaintiff and the injury to his feelings and that they might add thereto as compensation for his injuries "smart money." It is objected to this instruction that there was no evidence in the case tending to show the circumstances of the plaintiff, and therefore it was wrong to instruct the jury on that subject. It is shown by the evidence that the plaintiff was a school director, and that the contract in which the forgery was charged to have been made, was made by plaintiff in his official capacity. This does tend to some extent to show his circumstances in life and serves to characterize the whole transaction and show its publicity. The circumstances of the plaintiff referred to in the instructions, must not be confined to the facts relating to his pecuniary condition and whether he had a family and matters of that kind; but the reference should be to all of the circumstances of the case which give character to the slander and the injury occasioned thereby, and it was proper that the jury should be instructed to take such facts into consideration, and it was also proper to instruct them that they might give punitive damages. (*Buckley vs. Knapp*, 48 Mo., 152; *Larned vs. Buffington*, 3 Mass., 546; *Bump vs. Betts*, 23 Wend., 85.)

It is next insisted by the defendant that the court erred in admitting the evidence of the witness Atkins, in reference to the written contract, to which the charges set forth in the petition related, and in also admitting said contract in evidence. The only ground of this objection is that the contract proved was variant from the one referred to in the petition

in two particulars: 1st. The contract referred to in the petition was charged to have been executed by the school directors, when the one offered in evidence was executed by plaintiff as school director, and 2nd. That the school district as stated in the petition was "District No. 7," when the contract offered in evidence purported to be executed on the part of "District No. 8." The evidence of the witness showed that at the time the contract was entered into, the district was numbered 8, but that the number of the district had since been changed to 7, but that it was the same district and the contract was the same referred to by the defendant in making the charge of forgery. It must be borne in mind that this contract was only referred to in the petition as a preliminary inducement to explain the nature of the slanderous charge made by defendant against the plaintiff, and hence it was not necessary to set it out with any great particularity. It was only necessary to refer to the contract in a general way so as to notify the defendant of the particular charge intended to be proved. It cannot be seen how these technical variances could have injured the defendant, or how he could have been misled thereby. Our statute provides that "no variance between the allegations in the pleadings and the proof shall be deemed material unless it has actually misled the adverse party to his prejudice, in maintaining his action or defense upon the merits. When it shall be alleged that a party has been so misled the fact shall be proved to the satisfaction of the court by affidavit, showing in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just. (Wagn. Stat., 1033, § 1; Turner vs. Moore, 51 Mo., 501.)

This afforded the defendant a remedy if he had been misled by the variance between the instrument proved and the one described in the petition, and if he failed to avail himself of this statute, it is too late to complain in this court.

There are some other immaterial points raised in the court below, but they are not insisted on in this court. We see no material error in the record.

The judgment will be affirmed. The other judges concur.

Jordan v. Stevens.

EVAN JORDAN, Respondent, *vs.* ALLEN STEVENS, Appellant.

1. *Action to quiet title—Answer, what estops defendant.*—In suit under the statute, (Wagn. Stat., 1022, §§ 53, 54,) to quiet title where defendant by his answer disclaimed all right and title adverse to the petitioner but also denied plaintiff's title, *held*, error in the court to enter upon a trial of the cause. The disclaimer operated as a bar to any adverse claim of defendant; that portion of defendant's answer denying plaintiff's title was a mere nullity and surplusage.

Appeal from Buchanan Circuit Court.

Hill & Carter, for Appellant.

Allen H. Vories, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

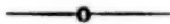
This was a proceeding under sections 53 and 54, (2 Wagn. Stat., 1022,) to quiet title to a tract of land. The petition set forth that the plaintiff was the owner in fee of the land and was in possession of the same, and that he was credibly informed, and believed, that the defendant made some claim to the land adverse to the estate of the petitioner, and prayed that the defendant might be summoned to show cause why he should not bring an action to try the alleged title if any, &c. The defendant filed an amended answer, in which he disclaimed all right and title adverse to the petitioner, but also in the same answer denied that the plaintiff had any title, and denied that the plaintiff was in possession. The court proceeded to try the case without calling a jury, and found the issues for the plaintiff, and gave judgment that the defendant be forever barred from setting up any claim adverse to the plaintiff and adjudged that the plaintiff pay all the costs. The defendant filed a motion for a new trial which was overruled and he has appealed to this court.

When the defendant filed his amended answer disclaiming all right and title to the land, that put an end to the case. There was nothing to try; the disclaimer itself so filed, amounted in law to a bar or estoppel against the defendants claiming any right or title adverse to the plaintiff. After thus disclaiming title, the defendant had no right to raise any

Slattery v. St. L., Kas. City & N. R. R. Co.

issue in the case, and that part of his answer denying the plaintiff's possession, &c., was in law a nullity. It is only where he claims title by his answer that he can proceed to show cause why he should not be required to bring an action. (See Sec. 54, 2 Wagn. Stat., 1022.) It was improper for the court, after the defendant's disclaimer, to enter upon the trial of the case. But as all the costs were adjudged against the plaintiff, and the judgment was only such as was the legal result of the defendant's disclaimer, we do not see that he is injured, and it is therefore unnecessary to decide any of the questions raised on this appeal.

Judgment affirmed. Judge Vories not sitting. The other judges concur.



MICHAEL SLATTERY, Respondent, *vs.* THE ST. LOUIS, KANSAS CITY & NORTHERN RAILROAD COMPANY, Appellant.

1. *Railroads—Enclosed timbered lands—Fencing of.*—The statute concerning railroad corporations, (Wagn. Stat., 31, § 43,) intended that the company should fence in the line of their roads adjoining all enclosed lands, whether timbered or otherwise.

Appeal from Livingston Circuit Court.

Broadus & Pollard, for Appellant.

John A. Noland, for Respondent.

I. The statute does not authorize a judgment for double damages, when the injury is committed on timbered lands for want of a fence.

ADAMS, Judge, delivered the opinion of the court.

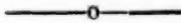
This was an action commenced before a justice of the peace, under § 43, 1 Wagn. Stat., 310. The plaintiff charged the defendant with killing several hogs and injuring others belonging to him, by reason of its failure to erect and maintain good

Stiles v. Smith.

and substantial fences on the sides of the railroad as required by that section, and claimed double damages under the statute, for the alleged injury. The case was taken by appeal to the Circuit Court, and was tried before the court without a jury, and resulted in favor of the plaintiff. The court gave judgment for double damages, and the only question presented here is whether the court had a right to double the damages. The proof showed that some of the hogs were killed within an inclosure where the road was not protected as the statute requires, and the others were killed and wounded where the road ran through timbered lands. The bill of exceptions does not show whether the timbered land was inclosed or uninclosed. The statute contemplates that all enclosed lands, whether timbered or not, shall be protected; that is, the road must be fenced where it runs through, along or adjoining enclosures of all kinds.

The object is to protect the cattle and other stock belonging to farmers and others located along the road. Timbered enclosures are as often used for pasturing stock as any other enclosure, and therefore fall within the meaning and spirit of the statute. Every intendment must be made in favor of the verdict and judgment. It was not shown that the timbered land was unenclosed, and therefore upon the record as it stands here, the judgment must be affirmed.

Judgment affirmed. The other judges concur.



ELIZA STILES, Administrator of the estate of ANDREW J. STILES, dec'd, Respondent, *vs.* FREDERICK W. SMITH, Appellant.

1. *Administrator—Action by, in the Buchanan Court of Common Pleas—Counter-claim may be set up—Statute, construction of.*—Section 6 of the act establishing Courts of Probate in the counties of Ralls, * * * Buchanan * * * etc. (Sess. Acts 1865-6, p. 83,) gives the Probate Courts exclusive jurisdiction "to hear and determine all suits and other proceedings against executors and administrators upon any demand against the estate of their testators or intestates."

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tate." *Held*, that in a suit by an administrator on an indebtedness to the estate of the deceased, defendant may set up as a counter-claim a debt owing him by the estate, although the action was brought in the Buchanan Court of Common Pleas, and not the said Probate Court.

2. *Administrator—Limitations, statute of—Letters, grant of—Averments as to.*—An administrator, although not bound to plead the general statute of limitations, must, in order to avail himself of it, plead the statute specially applying to suits against him in his official character; and must also allege the granting of his letters in the manner, and within the time prescribed by law.
3. *Administrator—Suit by, against creditor—Counter-claim—Limitations, statute of.*—The special statute of limitations touching administrators, contemplates cases where the creditor in the first instance brings his claim against the estate, and has no application to suits by the administrator against the creditor, where the demand of the latter is set up as a counter-claim. In such suit the only statute which can be pleaded against the counter-claim, under the statute (Wagn. Stat., p. 1274, § 3), is the general limitation law.
4. *Administration—Affidavit as to allowance of credits, etc., required only to causes in Probate Court.*—The requirement of the statute, (Wagn. Stat., p. 103, §§ 12, 15,) that a creditor, in establishing his demand against the estate of an administrator, shall make affidavit of allowance of all just credits and off-sets, etc., applies only to cases where the claim is presented in the Probate Court. When the party is sued in another court, the cause is tried upon pleadings and proofs as in ordinary actions.

Appeal from Buchanan Common Pleas Court.

Loan & VanWaters, for Appellant.

I. The statute of limitations must be pleaded; (McNair vs. Lott, 25 Mo., 182; Tramell vs. Adam, 2 Mo., 155; Benoist vs. Darby, 12 Mo., 196; Whittelsey's Mo. Pr., 227; Sedg. Const. & Stat., Law, 35.) otherwise it cannot be invoked.

II. The statutory bar under the administration law cannot avail the plaintiffs in any case, unless it appears that two years have elapsed since the grant of letters of administration upon Stiles' estate, and that notice thereof has been given as required by law. (Wiggins vs. Lovering, 9 Mo., 262; Bryan vs. Mundy, 17 Mo., 556; Clark vs. Collins, 31 Mo., 260.) Under the general limitation law the demands are not yet barred.

Allen H. Vories, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The administrator of A. J. Stiles brought his action in the

Court of Common Pleas, against the defendant to recover certain debts alleged to have been due the deceased in his lifetime. The petition contained two counts, which were both founded on work and labor performed and materials furnished by the deceased for and on behalf of the defendant, and at his special instance and request. The defendant filed his answer denying most of the allegations in the petition, and then set up as a further defense to each count, by way of counter-claim, separate debts which it was alleged were due and owing by the deceased at the time of his death to the defendant. At the trial the defendant offered evidence tending to prove the counter-claim set out in his answer, to which the plaintiff objected, and assigned as grounds of objection: 1st. That the court had no jurisdiction of the matter contained in the counter-claims, and that they were barred by the statute of limitations; and 2nd. That the counter-claims as pleaded did not sufficiently state the terms of the contracts out of which they arose, and that the defendant had not filed his affidavit and had not been sworn, to the purport that he had given credit to the estate of Stiles for all payments and set-offs to which the estate was entitled. The court sustained the objection and the defendant excepted, and a judgment having been rendered for the plaintiff, the defendant has brought the case here by appeal.

The objection raised to the jurisdiction is based on the act of March 19th 1866, (Sess. Acts 1865-6, p. 83,) which provides for the organization of Probate Courts in certain counties, Buchanan county being one of the number. The 6th section of that act gives the Probate Court exclusive jurisdiction "to hear and determine all suits and other proceedings instituted against executors and administrators upon any demand against the estate of their testator or intestate." * * * In actions or proceedings brought against the executor or administrator this act would prevail, and the plaintiff would not be entitled to proceed in any other forum; but the present case does not come within the provisions of the law. The defendant is not the party prosecuting the suit, he is not voluntarily

proceeding against the estate, as was contemplated by the act; but he is involuntarily brought into another court which unquestionably has jurisdiction over the case, and when he is brought there, he certainly has the right to make any defense which he may have to the action pending against him.

The question of the statute of limitations presents a point of more difficulty. The statute provides that all demands against the estate not exhibited within two years shall be forever barred, except as to persons who are under certain disabilities. (1 Wagn. Stat., p. 102, § 2.) But in order to have this effect, it will be necessary for the administrator before he can avail himself of the lapse of time as a bar to a demand against the estate of his intestate, to show that he has given notice of his letters in the manner, and within the time prescribed by law. (Wiggins vs. Lovering, 9 Mo., 262; Montelius vs. Sarpy, 11 Mo., 237; Blackwell vs. Ridenhour, 13 Mo., 125; Bryan vs. Mundy, 17 Mo., 556; Polk vs. Allen, 19 Mo., 467; Clark vs. Collins, 31 Mo., 260.)

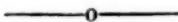
In Wiggins vs. Lovering, *supra*, it is expressly adjudged, that an executor or administrator who relies on the bar created by the special statute of limitations, must aver in his plea the fact of the notice having been given, and prove it on the trial. Nothing of the kind was done in this case. The defendant set up his counter-claims as a defense to the action, and the administrator in his replication denied their justness; but he made no mention of the statute of limitations, nor did he in any way aver that he had given the requisite and necessary notice of his letters, so that the special statute would be availing as a bar. When a party relies upon the statute of limitations he must plead it, otherwise it is presumed that he waives it. An administrator is not bound to plead the general statute of limitations, but he is bound to plead the statute specially applying to suits against him in his official character. As the statute was not specially pleaded, nor any facts averred in respect to notice which showed that the administrator was entitled to avail himself of the statute, the court erred in excluding the evidence for that reason. The statute permits de-

mands to be legally exhibited against an estate by proceeding either in the Probate Court or in the Circuit Court, but in all cases the exhibition must take place within the prescribed period of the statutory bar. All the cases above referred to, and which have been decided by this court, are cases where the creditor has attempted to exhibit his demand and obtain an allowance, after the time had expired within which it could be done according to the special limitation in the administration law. But the case we are now considering is of a different description, and entirely new in its character. Here the administrator waits till the time for proving up claims against the estate has lapsed, and then institutes suit against the defendant. The defendant in his answer pleads a counter-claim which he holds against the estate, and we are met with the objection that it cannot be allowed because it was not exhibited or proved up against the estate within the time limited. I am clearly of the opinion that the case does not fall within this provision of the law. The statute applies to and contemplates cases where the creditor is the actor, and himself moves in the matter of getting the allowance. There he must proceed within a certain time or be forever barred. But a person may well have a demand against an estate, and knowing that he is also indebted to the estate, neglect to prove up the same, supposing that the amounts are about equal, and that when he is proceeded against, he can plead his demand as a set-off and thus determine the whole matter in one suit. If in such a case the administrator should wait till after two years had expired before instituting such an action, it was certainly never designed or intended that the creditor should be deprived of a just or lawful claim. The statute upon the subject of set-offs says, that in suits brought by administrators and executors, debts existing against their intestate or testator, and belonging to the defendant at the time of their death, may be set-off by the defendant in the same manner as if the action had been brought by, and in the name of the deceased. (Wagn. Stat., p. 1274, § 3.) A fair and reasonable interpretation of this statute seems to me to be conclusive. If the

action had been brought by the deceased, then the only limitation that would have applied, or could have been pleaded, would have been the general statute of limitations. The special bar is not applicable to a case of this kind, and the case is not embraced within its meaning or scope.

There is no merit in the remaining point raised, that there was no affidavit or oath made by the defendant that he had allowed all just credits and off-sets to his claim. The sections of the statute (1 Wagn. Stat., p. 103, §§ 12, 13,) only require this affidavit or oath to be made, where the creditor presents his demand to the Probate Court for allowance. Where he sued in another court, the cause is tried upon the pleadings and proofs as ordinary actions, and the provisions referred to have no application. Wherefore it follows that the judgment must be reversed and the cause remanded.

All the judges concurring, except Judge Vories, who did not sit.



WILLIAM P. MENEFEЕ, Plaintiff in Error, *vs.* MARK ARNOLD,
Defendant in Error.

1. *Practice, civil—Demurrer—Non-joinder of parties—Principal and surety.—*

In an action to recover money charged to have been fraudulently obtained by defendant, the petition alleged that a judgment had been rendered against plaintiff as principal and defendant as surety on a bond; that defendant falsely represented that he had paid off and satisfied the execution; that on the faith of such representation, at the instance and request of plaintiff, one "A." paid defendant the amount sued for; that, in point of fact, the judgment had been satisfied, not by defendant, but by one "B." Demurrer charging defect of parties held not well taken. Although B. might sue defendant, as one of the defendants in the original execution, for money paid to his use, he could not sue on the claim of "A," as there was no privity between them, and defendant could not be held liable to "A" for the money paid by him, the same being paid at the instance of plaintiff. Money so paid might be considered as paid by plaintiff, who would have a right to look to defendant, while "A" could look to plaintiff.

Error from Linn Circuit Court.

G. D. Burgess, for Plaintiff in Error.

I. There is no allegation in the first count of the petition, that the money was paid by plaintiff to Arnold at the request of Rooker, or that Rooker ever consented to it after it was done. There is no privity between Arnold and Rooker, and certainly Arnold could not be made the debtor of Rooker without his consent. Then if these views be correct, neither Rooker nor J. R. C. Menefee could sue Arnold for the money. If Rooker paid off the execution as alleged in the petition, it may be that he has a remedy against the plaintiff for it, but there is certainly nothing in the petition which shows that he has any right to sue Arnold for it. If Arnold obtained the money through fraud, it does not now lie in his mouth to say that it belongs to another. (2 Greenl. Ev., § 119, 120; DeBernales vs. Fuller, 14 East, 590; Williams vs. Everett, 14 East, 582; Grant vs. Acton, 3 Price, 18; Hill. Torts, 42; Bliss vs. Thompson, 4 Mass., 488; Lyon vs. Annable, 4 Conn., 350.)

Alexander W. Mullins and Geo. W. Easley, for Defendant in Error.

I. The petition does not state a cause of action. If Rooker paid the money mentioned in the first count, he would have a right of action against the defendant, and the plaintiff could have no right of recovery. The plaintiff's debt to the bank has been paid, and he has no further duty to perform in that regard. No one is asserting any claim against him for that debt, and he is uninjured by anything appearing in this case; and to allow him to recover would subject the defendant to two judgments and two satisfactions for the same matter. If the plaintiff is permitted to recover in this action, Rooker could then sue and recover also, and this action would be no bar to an action against defendant by Rooker, because there is no privity between Rooker and the plaintiff.

WAGNER, Judge, delivered the opinion of the court.

When this case was here before (51 Mo., 536), we reversed the judgment on the ground that the plaintiff's claim, as it

was then presented, was barred by the statute of limitations. After it went back to the court below, there was an amended petition filed, stating facts which evaded the bar of the statute, and to that petition a demurrer was filed and sustained, and final judgment having been rendered thereon, the cause is appealed here for review.

The amended petition contained two counts. The first alleged that on the first day of June, 1860, judgment was rendered in the Linn County Circuit Court against plaintiff, as principal, and Grant, Easley and defendant, as his sureties, for the sum of one thousand and six dollars and eight cents, and \$11.62 costs, and in favor of the Merchants' Bank of St. Louis; and that upon said judgment an execution was issued against the said parties defendant, on the 27th day of August, 1860, and delivered to Thomas N. Rooker, then sheriff of Linn county; and that afterwards, on the 1st day of April, 1863, defendant falsely and fraudulently, and with intent to cheat, wrong and defraud plaintiff, did represent to plaintiff that he had paid off and fully satisfied said execution, upon which statement plaintiff fully relied, and at the instance and request of plaintiff, one Richard C. Menefee paid to the defendant in good faith the sum of five hundred dollars and took his receipt, which was on the 10th day of June, 1870, assigned to plaintiff for a valuable consideration. It is then alleged that the representations made by the defendant at the time he received the money were false, and that defendant did not pay off the execution or any part thereof, but that Thomas M. Rooker paid off and fully satisfied said judgment and execution.

The second count alleges that Brownlee, as assignee of plaintiff, paid defendant eighty-five dollars, which sum was to be appropriated to the satisfaction of a judgment, and that the appropriation was not so made, &c.

Defendant demurred to both counts, generally, because the petition did not state facts sufficient to constitute a cause of action, and specially: 1st. Because there is a defect in parties plaintiff in this, that from the allegation contained in the first count, if any cause of action exists in favor of any one against

defendant, such cause of action would be in favor of either Richard C. Menefee or Thomas M. Rooker, and no assignment of such alleged cause of action is set up in said count in the petition; and 2ndly, as to the second count in the petition, plaintiff does not show any right or interest in the alleged claim against defendant for the money charged to have been received by him from Wm. H. Brownlee.

As to the propriety of the court's action in sustaining the demurrer to the second count, I entertain no doubt. Plaintiff did not show that he had any interest in the money. He alleged that his assignee, Brownlee, paid the money, and therefore the right and title seems to be in Brownlee, and, if any person is entitled to recover it back he would be the proper person to do so. But as to the first count, I am of the opinion, that the court improperly sustained the demurrer. If Rooker, as is alleged, paid off and satisfied the execution, his recourse would be against the defendants in the execution for money paid for their use, but he could not sue on this demand specially paid by Richard C. Menefee, for there would be no privity existing between the parties. So, in reference to the payment made by Richard C. Menefee, it was at the instance and request of the plaintiff, and the plaintiff would alone be liable to him. The plaintiff avers that the money was paid at his instance and request, and that may be regarded as equivalent to saying that he paid the money or caused the same to be paid. If so, I see no obstacle in the way of his recovering it back.

The judgment should be reversed and the cause remanded, with permission to the defendant to answer. The other judges concur.

Ross v. Murphy.

CHARLES R. ROSS, Respondent, *vs.* GEORGE W. MURPHY,
Appellant.

1. *Courts—Common Pleas—Circuit—District—Appeal—Constitution.*—Section 13 of the Act organizing the Common Pleas Court of Caldwell county, (Sess. Acts, 1870, pp. 209-10), which gave the Circuit Court of that county appellate jurisdiction over the former court, was not in conflict with the then provision of the State Constitution, (Art. VI, § 12), creating District Courts, when that provision is taken in connection with section 1 of the same article, vesting in the General Assembly the power of establishing inferior tribunals. (Harper vs. Jacobs, 51 Mo., 296.)

Appeal from Caldwell Circuit Court.

James McFerran, for Appellant.

I. The Circuit Court of Caldwell county has appellate jurisdiction from the final judgments and decisions of its Common Pleas Court, by appeal or writ of error. (See § 13 of Act of 1870, pp. 209-10.) Wherefore the Circuit Court erred in dismissing said appeal for want of jurisdiction, and its judgment should be reversed and the cause remanded.

II. The Supreme Court has no jurisdiction of appeals or writs of error, taken directly from the Common Pleas Court of said county, to the Supreme Court.

Hoskinson & McLaughlin, for Respondent.

I. The Circuit Court has no superintending control nor appellate jurisdiction from the final judgments of the Common Pleas Court by appeal or writ of error. (See § 12, Art. VI, State Const., 1865.)

II. After the abolition of the District Court, all appeals and writs of error must be prosecuted directly to the Supreme Court from all courts of record, except Probate and County Courts.

SHERWOOD, Judge, delivered the opinion of the court.

In the Common Pleas Court of Caldwell county, the plaintiff had judgment from which the defendant appealed to the Circuit Court of that county, by which court the appeal was, on motion of plaintiff, dismissed on the ground that that court had no jurisdiction over appeals from the Common Pleas

Ross v. Murphy.

Court. A motion of defendant to re-instate the cause after its dismissal was unsuccessful, and he has appealed here.

By the terms of the Act which organized the above referred to Common Pleas Court, it was given concurrent original jurisdiction with the Circuit Court, and a superintending control as well as appellate jurisdiction was conferred on the latter court over the Common Pleas Court its judgments and decisions. (Laws 1870, pp. 209-10, §§ 4, 13.)

The Act to which reference has been made went into effect October 1st, 1870, anterior to the adoption of the amendment which abrogated that clause of the constitution whereby District Courts were established. And it is now contended that the provisions of section thirteen, *supra*, requiring appeals to be taken from the Common Pleas Court to the Circuit Court, were void; as being in conflict with § 12, Art. 6, of the constitution, creating district courts and defining their jurisdiction.

But no such conflict is perceived, when the section in question is considered in connection with section one of the same article, which vests in the general assembly the power of establishing inferior tribunals. The power thus conferred, necessarily embraces and implies the authority of pointing out the mode by which causes are transferred to the appellate court, and as to whether appeals should be taken directly, or through intervening tribunals, to such courts. Nor is the appellate jurisdiction of the courts of ultimate resort at all curtailed or impinged upon, by reason of the fact that so far as concerns appeals from the inferior courts established by legislative enactment, the law-makers have seen fit to prescribe an indirect method.

The power of the legislature in regard to these courts of statutory origin is broadly asserted, and as I think conclusively shown in the case of *Harper vs. Jacobs*, 51 Mo., 296. If the foregoing views are correct, it follows, that the Circuit Court had jurisdiction of the cause, and therefore erred in dismissing the appeal.

Judgment reversed and cause remanded. Judge Vories dissents. The other judges concur.

Kiley v. Oppenheimer, et al.

FLORENCE KILEY, Respondent, vs. M. OPPENHEIMER, JOSEPH DURFFEE AND WM. H. BAITLETT, Appellants.

1. *Tax bills—May be amended by City Engineer after expiration of his term.*—A tax bill may be certified anew by a City Engineer, after the expiration of his term of office, in order to cure informalities in his certificate.
2. *City charter—Ordinance—Advertisement for street improvement contracts—Premature award—Effect of.*—Where an ordinance made in pursuance of a city charter required the City Engineer to give at least thirty days advertisement for proposals for street macadamizing contracts, an award of the contract in the meantime would be void, and work done on such contract would not lay the foundation for recovery on a special tax bill against the property owner.

Appeal from Buchanan Common Pleas.

H. K. White, for Appellants

I. Advertising to receive bids till a specified time, and closing a contract with a favorite contractor long before that time had expired, carries the stamp of fraud and illegality upon its face. (Dill. Mun. Corp., p. 605; *Mitchell vs. Milwaukee*, 18 Wis., 92; *City of Dubuque vs. Wooton*, 28 Iowa, 571; *City of Lowell vs. French*, 6 Cush., 223; *Nash vs. St. Paul*, 11 Minn., 174.)

Van Waters and Everett & Reed, for Respondent.

I. The notice was for thirty days, and therefore regular on its face, and in literal compliance with the requirement. But the award was made to plaintiff a few days before the expiration of the thirty days' notice. If defendant had alleged and proved that in consequence of this irregularity, some one had been prevented from offering a lower bid, this question might then assume graver magnitude. (4 Seld., 91, 93.) But no defense of this kind is set up. The question is conceded to be one of law, presenting nothing but the abstract question, whether an omission to comply strictly with the ordinances *per se*, invalidates the contract of plaintiff? This requirement of the ordinance was clearly directory. (30 Mo., 537; 2 Am. Rep., 79, 80.)

SHERWOOD, Judge, delivered the opinion of the court.

Kiley v. Oppenheimer, et al.

The plaintiff Florence Kiley brought his action in the Buchanan County Court of Common Pleas, against Marcus Oppenheimer, to recover the amount of two special tax bills, for macadamizing, &c., alleged to have been done by plaintiff in front of two lots on Missouri street in the City of St. Joseph, under and by virtue of a contract entered into with that city through its engineer. Oppenheimer did not appear to the action, but Durfee and Baitlett entered their appearance, and amongst other matters, pleaded the general issues. A trial without the intervention of a jury resulted in a judgment for the plaintiff.

In the view which I take of this case, it is entirely unnecessary to discuss the numerous points which have been urged here for a reversal. Before passing, however, to a point of graver importance, it may be observed that the position of defendants as to the inadmissibility of the tax-bills certified anew by the City Engineer, after the expiration of his term of office, in order to cure certain informalities in his certificates to such bills, is untenable. Such amendments have been held valid by a former decision of this court. (See *Kiley vs. Cranon*, 51 Mo., 541.) But a difficulty which I regard as insuperable in the case before us, is presented in the fact, that during the time publication was being made for the reception of proposals the contract was prematurely awarded to plaintiff, in utter disregard of the express provisions of the ordinance of May 13th, 1865, requiring the City Engineer to give at least thirty days' notice by advertisement, in the official paper of the city, that proposals would be received at his office for the performance of the contemplated work. This ordinance was passed in conformity with the provisions of the amended charter of the City of St. Joseph, approved February 8th, 1865, which required, that the mode of assessing the costs of macadamizing the streets, &c., against the owners of adjoining property, should be prescribed by ordinance, and such work completed under like authority. (§§ 4, 5, p. 47, Laws & Ord.) Where extraordinary powers are conferred by statutory enactment, powers which even in their legitimate exercise are very

often productive of great hardship, if not of actual abuse and oppression, the greatest caution should attend every step taken in a pathway obviously unknown to the common law. The powers bestowed by the above ordinance were clearly of this character, and therefore demanded on the part of those attempting to execute them the most rigid observance, and the strict performance of those conditions precedent upon which alone their validity depended. The ability of the city to create a lien on the property of one of its citizens in the manner pointed out in the ordinance referred to, is founded not in any absolute or pre-existent right, but rests exclusively in an adherence to the method prescribed by ordinance in pursuance of the authority contained in the charter. The books abound with instances, enunciatory and illustrative, of this familiar doctrine.

In the case of the State of Missouri vs. The Bank of the State of Missouri, 45 Mo., 528, the principle I have announced received the unqualified approbation of this court in a very elaborate and exhaustive discussion, in which numerous authorities were reviewed. Among those cited in support of the position here taken, was that of Brady vs. The City of New York, 20 N. Y., 312. In that case, the law made it the duty of the street commissioner, before letting out work to be done on the streets, where the cost would exceed \$250, to receive proposals for the work, either founded on sealed bids, or after publication of notice for the full period of ten days, and that all such contracts should be given to the lowest bidder with adequate security. A bid was accepted, but not in compliance with the law, and the contractor performed the work. Subsequently to such performance, the common council attempted to validate the contract thus made; but the court held that it was void and the attempted confirmation, did not bestow any validity upon the illegal transaction.

Denio, J., delivered the opinion of the court, and in speaking of the law whose directions had been disregarded, said: "It was based upon motives of public economy, and originated perhaps, in some decree of distrust of the officers to whom

the duty of making contracts for the public service was committed. If executed according to its intention, it will preclude favoritism and jobbing. It does not require any argument to show that a contract made in violation of its requirements is null and void."

In the *City of Lowell vs. Wentworth*, 6 Cush., 221, a sidewalk was built in conformity to ordinance, and in further conformity thereto, the auditor was required to give immediate "notice in writing to such person who shall have been reported to him as liable to be assessed, of his intention to make an assessment, ten days at least before making the same; appointing in said notice, a time and place at which all persons interested may appear, and be heard in relation to such assessment." This notice was given to the proprietors of the adjoining property, but not in the way prescribed, and the court held that the giving of notice in the manner required, was "a condition precedent to the validity of the assessment." So also in the case of the *City of Dubuque vs. Wooton*, 28 Iowa, 571, the same principle is enunciated. The charter of that city provided for the macadamizing, &c., of streets "under such regulations as may be prescribed by ordinance." The ordinance pursuant to this provision, required a publication of the resolution of the city council providing for such work on the streets to be done; and also required a publication of the resolution that a special tax would be levied for the payment of such improvements. These publications were not made, and the court held that the claims of the city for the performance of the work had no legal existence, and among other things remarked that, "we hold that the publication of the resolution prescribed in the ordinance is necessary to authorize the city to enforce in any manner the collection of the tax. The laws of the city are equally binding upon the city and the citizens. They cannot be dispensed with by the city, when rights are secured under them, or the exercise of power by the city is regulated by them, or power itself conferred by the charter flows through them. The city, if these laws require preliminary proceedings or acts necessary to the acqui-

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sition of power or rights in particular cases, cannot dispense with their requirements."

The evident purpose of the Ordinance of May 13th, 1865, in requiring an advertisement for proposals for the macadamizing of the streets, was to give the matter publicity, and thus invite a fair competition in order to impose the least possible burden on the owners of property adjacent to the work to be performed. But whatever may have been its object, it is sufficient to say, that the city, aside from the provisions of its charter and ordinances passed in pursuance thereof, is utterly powerless to act.

Judgment reversed.

—o—

STATE OF MISSOURI, *ex rel.*, THE K. C., ST. J. & C. B. R. R. Co., Respondent, *vs.* JOHN SEVERANCE, *et al.*, Appellants.

1. *Statute—Repeal of by implication not favored—Question of repeal one of intent.*—A general affirmative statute will not repeal a former one which is special in its nature, unless negative words are used or the acts are so inconsistent, that they cannot stand together.

In such cases there is nothing but repeal by implication, and repeals in that manner are not favored. But the question is really one of intention, and where legislative intent is manifest it must prevail.

2. *Railroads, taxation of.—State Board of Equalization—Act of March 10th, 1871, applies to City of St. Joseph—Act constitutional—Taxation under, uniform.*—The proper intention and construction of the act of March 10th, 1871, providing a uniform system of assessing and collecting taxes on railroads (Sess. Acts 1871, p. 56), was that all railroad property in this State was to be assessed by the State Board of Equalization; and that they were to ascertain the value of such property within the limits of any city, and transmit that amount as the proper assessment in favor of that city; and that their action in this regard was exclusive of all other officers either State or municipal. Hence, the above act had the effect of repealing by implication the prior charter power of the City of St. Joseph to make the like assessment within the limits of that city.

Said act is not void as violating that provision of the State Constitution which declares that taxation on property shall be uniform. (State Const., Art. I, § 30.) Under that law there is no exemption and no inequality in the taxation. For any omission to assess property or for too low an assessment, the Board is amenable to the same supervision as other Boards performing similar duties.

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3. *Railroads—Rolling stock of—Distribution for purposes of taxation—Act March 10th, 1871.*—The rolling stock of a railroad company, as a general principle, should be assessed and taxed where the corporation has its residence. But this principle of law may be modified by the legislature. And it was competent for the General Assembly, by the act of March 10th, 1871 (Sess. Acts 1871, p. 56) to say that for the purposes of taxation property of that description should be distributed through the counties, cities or towns through which the road passed, in proportion to its length in those respective localities.
4. *Railroads—Act of March 10th, 1871—Taxes how collected by cities, etc., from R. R. Companies.*—It is not an insuperable objection to the act of March 10th 1871, for taxation of railroads, (Sess. Acts 1871, p. 56) that it designates no particular mode by which cities and towns can collect the taxes from the railroads under the valuation made by the Board of Assessment. Where a statute creates a right and gives no remedy, the party may resort to the usual remedy applicable to such case.

Appeal from Buchanan Common Pleas.

Chandler & Sherman, for Appellants.

I. The Act approved March 10th, 1871, is unconstitutional. (See Art. XI, § 16; Art. I, § 30, Const. of Mo.)

This rule subjecting property to taxation in proportion to its value is imperative. (Life As. Am. vs. B. of As., 49 Mo., 517.)

II. Uniformity, which implies equality, in the burden of taxation, constitutes the very substance designed to be secured by the rule, and a palpable departure from equality in the burden imposed is plainly within the constitutional prohibition. (Life As. vs. B. of As., 49 Mo., 517; Bank vs. Hines, 3 Ohio St., 15; Weeks vs. Milwaukee, 10 Wis., 256; Covington vs. Southgate, 15 B. Mon., 498-500; Morford vs. Unger, 8 Iowa, 92.)

III. To the end that taxation, where this rule is in force, may be equal and uniform, there must be some system of apportionment; which apportionment must be applied to all property within the taxing districts with absolute uniformity. A city tax, for example, must be apportioned and levied with absolute uniformity upon the taxable property within its limits, and with reference to a uniform standard: (Cooley on Const. Lim., pp. 495-515; 2 Kent's Com., 231; Weeks vs. Milwaukee, 10 Wis., 256; Bank vs. Hines, 3 Ohio St., 15 et

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seq.) To render taxation uniform in any case two things are essential: 1st. The taxing district should confine itself to objects of taxation within its limits. 2nd. The apportionment of taxes should reach all objects of taxation within the taxing district; in other words, in levying taxes, the valuation of property must be uniform and the rate uniform, so that the burden will fall alike upon all taxable property throughout the territorial limits of the state or municipality within or for which the tax is to be raised. (Cooley on Const. Lim., pp. 499-503; Wells vs. Weston, 22 Mo., 385; Gilman vs. Sheboygan, 2 Black, [U.S.], 510; Wooldridge vs. Detroit, 8 Mich., 301; Knowlton vs. Supervisors, 9 Wis., 410-421; Weeks vs. Milwaukee, 10 Wis., 242, 282; Mygatt vs. Washburn, 15 N. Y., 316; Exchange Bank vs. Hines, 3 Ohio St., 1; Merrick vs. Amherst, 12 Allen, 504; People vs. Brooklyn, 4 N. Y., 419; Attorney General vs. W. L. & F. R. Pl'k R'd Co., 11 Wis. 42; Zanesville vs. Auditor of Muskingum Co., 5 Ohio St., 592.) Considered and judged in the light of the foregoing principles, the said act of March 10th, 1871, as the relator construes its provisions, is null and void.

Though the "Act to provide for a uniform system of assessing and collecting taxes on railroads," approved March 10th, 1871, should be decided to be constitutional, yet it does not repeal, alter or modify the charter of St. Joseph.

1st. The said act of March 10th, 1871, is a general act, while the city charter and the several amendments thereof are local and special acts. (Sess. Laws 1871, p. 56; Laws and Ordinances of St. Joseph, p. 43, § 3, and p. 7, § 1.) Statutes of a general nature do not repeal, by implication, the charters and special acts enacted for the benefit of particular municipalities unless such appears to have been the intent of the legislature. When the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute, treating the subject in a general manner and not expressly contradicting the previous act, shall not be considered as intended to affect the more particular previous act, unless it is absolutely necessary to give the latter act such a construc-

tion in order that its words shall have any meaning at all. (Dill. Mun. Corp., §§ 54, 611, 612; Sedg. Stat. and Const. Law, 123-4; Mayor of Troy vs. Mutual Bank, 20 N. Y., 387, 388; Williams vs. Pritchard, 4 D. & E., 2; Langdon vs. Fire Depart., 17 Wend., 234; Furman vs. Knapp, 19 Johns, 248; R. R. Company vs. Alexandria, 17 Grattan [Va.], 176.)

The legislature did not intend that the said act of March 10th, 1871, should repeal, alter or modify the charter of St. Joseph, because:

1. The city charter provides that the Mayor and Council "shall have power to levy and collect from railroad corporations, upon the value of their property, both real and personal, within the limits of the said city, the same taxes for municipal purposes that are levied and collected upon the real and personal property of the citizens of said city." (Sess. Acts 1864, p. 430, § 3; Laws & Ordinances of St. Joseph, p. 42, § 3.) 2. The charter also provides a method by which delinquent taxes, assessed against real estate within the city, may be collected. (Sess. Acts 1864, p. 433, § 3 to 17; Laws and Ordinances of St. Joseph, p. 30, § 3 to 17.) 3. The aforesaid act of March 10th, 1871, provides no method by which the municipal authorities may enforce the payment of city taxes upon any assessment made under the provisions of said act, and therefore the city must conform to the mode of procedure prescribed in the charter, or it is powerless to collect its taxes assessed against the real estate of those who fail or refuse to pay them. (Blackwell on Tax Titles, 447; Stetson vs. Kempton, 13 Mass., 272; Dillingham vs. Swan, 5 Mass., 547; Williamsport vs. Kent, 14 Ind., 306.)

But the method provided by the city charter cannot be applied to any assessment made under the provisions of this act. The assessment apportioned to the city by the "special board" created by said act, includes in one sum the valuation of relator's real and personal property subjected by said act to taxation by the city. The method prescribed by the city charter for collecting delinquent taxes assessed against real estate cannot be applied to the collection of delinquent taxes assessed

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against personal property. By this method, too, each piece or parcel of real estate is proceeded against for the taxes chargeable against it. And if the method of collecting delinquent taxes assessed against personal property be by distraint, as the relator contends, the municipal authorities cannot know or be informed of the proportion of the aggregate amount apportioned to the city which is properly chargeable against the relator's personalty. The city has no power to enforce against the relators' real estate the taxes chargeable against its personalty. (State to use of Rice vs. Powell, 44 Mo., 436.) Nor can the city enforce against the relator's personal estate the taxes chargeable against its realty, for such a procedure is not authorized, but rather prohibited, by the city charter.

Hence, we argue that the legislature did not intend that said act of March 10th, 1871, should operate to repeal, alter or modify the city charter by imposing upon St. Joseph an impracticable system of assessing property for purposes of taxation.

Though said act of March 10th, 1871, was passed subsequently to the enactment of the city charter, yet the former is a general and affirmative act and does not abrogate the charter, which is a particular and local act, unless negative words are used or unless the acts are irreconcilably inconsistent. Said general act and that portion of the city charter relating to the assessment and collection of city taxes, being *in pari materia*, must be taken and construed together and made to stand if they can be reconciled. As there may be a general prohibition, with indulgence to particular individuals, so also there may be a general system of procedure with special local exemptions or exceptions. (Sedg. on Stat. and Const. Law, pp. 123-4; Potter's Dwarrris, 514, 532-3; State, *ex rel.* M. & M. R. R. Co. vs. Co. Court, 41 Mo., 459; St. Louis vs. Alexander, 23 Mo., 483; Deters vs. Renick, 37 Mo., 597; Brown vs. County Commissioners, 21 Penn., 37; Mayor of Troy vs. Mutual Bank, 20 N. Y., 387; Hume vs. Gossett, 43 Ill., 297; Daviess vs. Fairburn, 3 How., [U. S.] 636.)

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Stringfellow, Hall & Oliver, for Respondent.

I. The act of March 10th, 1871, applies to cities and incorporated towns, and provides for the assessment of railroad property within their limits. This is not only the plain meaning of the law, but it is the construction which has been given to it by the officers whose duty it is, to administer it and by all the cities and incorporated towns in Missouri through which railroads pass, except the city of St. Joseph. (State vs. Pearcey, 44 Mo., 160; 16 Iowa, 353; 3 Bush. Ky., 650; 13 Wall., 270; 12 Iowa, 534, 539; Sess. Acts 1871, pp. 56, 57, 58, 59, §§ 1, 4, 8; Sess. Acts 1873, pp. 63, 64, 65, 66, 67, 68, §§ 1, 2, 8, 13, 18.)

II. The fact that said act does not provide a specific mode of collecting taxes against railroad companies by cities and towns makes no difference. Cities and towns can avail themselves in such cases of the provisions of their charter if applicable, and if the provisions of their charter are not applicable they may sue for the taxes. (Carondelet vs. Picot, 38 Mo., 130.)

III. The act of March 10, 1871, is constitutional. Said act requires all property to be taxed according to its actual value in cash. And this is all that our constitution requires. (Sess. Acts of March 10, 1871, p. 56, § 2; Const. Mo., Art. I, § 30.) The Constitution of Missouri does not require the same individual to assess all property. The act of 1871 adopts a just and fair mode of appraising railroads for taxation. (27 Ills., 64; 25 Ind., 178; 16 Iowa, 353; 3 Bush. [Ky.], 650.)

WAGNER, Judge, delivered the opinion of the court.

The main questions in this case are whether the act approved March 10, 1871, (Sess. Acts 1871, p. 56,) entitled "an act to provide for a uniform system of assessing and collecting taxes on railroads" applies to the city of St. Joseph, and whether it is a valid and constitutional law?

After the board of equalization provided for in said act had made their assessment on the property of the relator, and apportioned the amount on the same within the limits of the

city, and duly certified their return, the city authorities proceeded to make a new and additional assessment greatly increasing the amount, claiming that they were not bound by the assessment made by the state board, and that the act in question had no application to the city.

The relator, after appealing unsuccessfully to the city court of revision and appeals, obtained a writ of mandamus to compel the city authorities to change the city assessment to the amount assessed by the state board of equalization.

Upon the hearing of the cause the writ was made absolute, and the defendants appealed.

At the threshold of this case we are met with the objection that the plaintiff has misconceived its remedy, and that mandamus will not lie. But as the matters in issue have been regularly passed upon, and they have been brought here, we think it will be more consonant to justice, to examine the case and put it at rest than to turn the party out of court for such a reason, although we might be of the opinion that the defendant's counsel were correct in their position.

The first section of the act of 1871 provides that all railroads now constructed, in course of construction, or which shall hereafter be constructed in this state, and all other property, real, personal or mixed, owned by any railroad company or corporation in this state, shall be subject to taxation, for state, county and other municipal or local purposes, to the extent and in the manner thereafter set forth.

Section 2 provides, that on or before the first day of February in each and every year, the president or other chief officer of every railroad company whose road is now, or which shall hereafter become so far complete and in operation as to run locomotive engines, with freight or passenger cars thereon, shall furnish to the state auditor a statement duly subscribed and sworn to by said president or other chief officer, before some officer authorized to administer oaths, setting out in detail all the property of said company, including the road-bed, buildings, machinery, engines, cars, lands, workshops, depot and all other property of whatsoever kind, with the loca-

tion thereof, and the actual value thereof, in each county, in cash.

By section 4, in addition to the statement required by the preceding section, it is made the duty of the president or other chief officer, on or before the first day of February, in each and every year, to furnish the state auditor with a statement duly subscribed and sworn to, setting out the length of such road that may be so far complete and in operation as to run locomotive engines, with freight or passenger cars thereon, and the number of miles in length of such road in each county, city or incorporated town in which said road may be located.

By section 5 the state auditor, state treasurer and the register of lands are constituted a special board of equalization of railroad property, with all the powers, and entitled to discharge the same duties with reference to railroad property as the state board of equalization with reference to all other property.

Section 6 requires the board to meet at the office of the state auditor on the first Monday in May in each and every year; when the state auditor is commanded to lay before the board all the returns which have been made to him in compliance with the law.

By section 7 it is provided as follows: "The board shall thereupon proceed to adjust and equalize the aggregate valuation of the property of each one of the railroad companies liable to taxation under the foregoing sections of this act. The board shall have power to summon witnesses by process issued to any officer authorized to serve subpoenas, and shall have the powers of a circuit court to compel the attendance of such witnesses and compel them to testify. They shall have power to increase or reduce the aggregate valuation of the property of any railroad company in accordance with the evidence produced before them, and as they may deem just and right. If the said board should deem personal inspection of the property of any railroad company necessary to a thorough understanding of its value and a just decision, they shall

have power to visit such road, and may adjourn from time to time for that purpose."

Section 8 declares: "The board shall apportion the value of all lands, work-shops, depots and other buildings belonging to each railroad company to the counties, cities or incorporated towns in which such lands, work-shops, depots and other buildings are situate, and the aggregate value of all other property of each railroad company shall be apportioned to each county, city or incorporated town in which such road shall be located, according to the ratio which the number of miles of road completed in such county shall bear to the whole length of such railroad."

It is now contended that this law, general in its character, does not apply to the City of St. Joseph, whose charter, passed prior thereto, gave it express power to tax the property of railroad companies within the corporate limits. There is no question concerning the now generally admitted rule, that a general affirmative statute will not repeal a former one, which is special or particular in its nature, unless negative words are used, or the acts be so entirely inconsistent that they cannot stand together. In such cases there is nothing but an implication of repeal, and repeals in that manner are not favored. But it is really a question of intention, and where the legislative intent is manifest or apparent it must prevail. The statute says, that all railroads now constructed, in course of construction, or which shall hereafter be constructed, and all other property, real, personal or mixed, owned by any railroad company or corporation, shall be subject to taxation for State, county, or other municipal or local purposes. A board of equalization is then organized with full and complete power to assess the roads and all their property. Not only does the board complete and ascertain the value in their assessment, but it is made their duty when the assessment is arrived at, to apportion the value of all lands, work-shops, depots and other buildings belonging to each railroad company to the counties, cities or incorporated towns in which such property is situate. If it were intended that the cities and towns should still have the privi-

lege and power of again assessing the property under their municipal ordinances, for what purpose was the law enacted? The provision apportioning the lands, work-shops, depots and other buildings to the municipalities, under such a construction, would be a mere nullity and amount to nothing more than unmeaning verbiage. We must suppose, that the legislature meant something, and that they intended what they said, and that therefore all the property was to be assessed by the board, and that they were to ascertain the value within the limits of any city, and transmit that amount as the proper assessment in favor of the city, and that their action in this regard was exclusive of all other officers, either State or municipal. This construction is obvious, else the act has no efficacy.

It is further insisted with great zeal, in an able and eloquent argument, that the act is void, because it violates that provision of our constitution which declares that taxation on property shall be uniform. We are unable to perceive the force of this objection. Under the act no part of the company's property is exempt, and it is all taxed alike upon a cash valuation. The board of equalization assess all the property at its cash value, and then it is taxed in the same manner as all other property of a like description. The principle of uniformity is adopted throughout. Its validity is in no wise impaired or affected because a different mode of assessment is provided for, so long as the same end is attained. It is not an absolute or indispensable requisite that the county or corporation assessor should make the assessment. That duty may be devolved on any other officer or officers, if uniformity is accomplished and preserved.

There is no attempt here to tax one section for the benefit of another, nor is any real inequality produced. The board apportions and sets off the value of all real estate to the counties, cities or incorporated towns in which it is situated, and they collect what is due to them upon the same. Thus there is no exemption and no inequality. Should the board omit to assess any property or place too low an estimate upon it, the

proper proceedings should be taken by those interested to have the error or mistake rectified. The board has the power of a court of appeals for the purposes for which they are organized, and may take testimony, summon witnesses, raise or diminish the value of the property as in their judgment may be right to make a just, fair and uniform assessment. As such board they are amenable to the same supervision as other boards performing similar duties.

But the point is strongly pressed that the law is objectionable because aside from the real estate it provides that the aggregate value of all other property of each company shall be apportioned to each city, county or incorporated town in which such road shall be located, according to the ratio which the number of miles of such road completed in such county shall bear the whole length of such railroad. So far as the actual road-bed is concerned, it is not questioned that this is a sufficiently uniform and just manner of making the taxes. But it is argued with great earnestness, that in the phrase "all other property," is included the rolling stock of the railroad, and that, the company having its chief offices for the transaction of its business in the city of St. Joseph, there and there alone this property should be assessed and made liable for taxes; that though constantly used in other counties through which the road passes, in the transaction of the business of the road, still its only *situs* is where the chief office is located, and there it must be taxed.

The proposition is undoubtedly true, that where a corporation has its residence, there the property of this description is liable to assessment and taxation, if the law has prescribed no different rule or regulation on the subject. This notion of the *situs* of personal property following the personal residence of the corporation, is a legal fiction, but is not an unbending and uncontrollable principle of law. It may be modified by the legislature. The rolling stock of a company is in a constant state of transition, and has no more real local existence in one county than another. A county through whose whole length it runs might well think that it had as much right to tax it as

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a city that it passed through but for a mile or two at most ; but both would have no right to levy a tax, for that would be double taxation upon the same property.

This machinery, by which the road is operated, is constantly passing from one terminus to the other of the entire road, and to save all cavil and dispute in respect to it, it was perfectly competent for the legislature to say that it should become a part of the road itself, and become property the same as the road, and that for the purposes of taxation it should be equally distributed through the counties, cities or towns through which it passed, in proportion to its length in those respective localities.

It is, however, said, that the act of the legislature designates no particular mode by which cities and towns can collect the taxes from the company under the valuation made by the board of assessment. But this is not an insuperable objection. The well known rule is, that where a statute creates a right and gives no remedy, the party may resort to the usual remedy applicable to such a case. (*Carondelet vs. Picot*, 38 Mo., 130 ; *Dudley vs. Mayhew*, 3 Comst., 9 ; *Almy vs. Harris* 5 Johns., 175.)

I think the judgment should be affirmed. The other judges concur.

—o—

ARTHUR KIRKPATRICK, Respondent, *vs.* FREDERICK W. SMITH
AND THOMAS B. WEAKLEY, Appellants.

1. *Promissory notes—Usurious interest, cannot be credited upon.*—Usurious interest paid upon a note to procure an extension, cannot be recovered back, and in suit upon the note such payments cannot be applied as credits upon the note. (*Perrine vs. Poulson*, 53 Mo., 309 ; *Ransom vs. Hays*, 39 Mo., 445.)
2. *Promissory notes—Antecedent equities, etc.*—An innocent purchaser, before maturity without notice, of a negotiable promissory note, cannot be affected by antecedent equities.

Appeal from Buchanan Common Pleas Court.

Kirkpatrick v. Smith, et al.

Loan & Van Waters, for Appellants.

Thomas & Ramey, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action brought by the plaintiff as indorsee, against the defendant Smith as maker, and the defendant Weakley as indorser, of a negotiable promissory note. The petition alleges that the plaintiff was indorsee of a note for value before maturity. The defendant Weakley set up no defense; the defendant Smith set up by answer the following defense: He denied that the plaintiff was an innocent holder before maturity for value, and charges that there was a fraudulent combination between Weakley and the plaintiff to deprive defendant of the benefit of certain payments he had made, which together with his admitted payment of interest indorsed on the note, paid off the debt. He charges that those alleged payments were made of moneys which had been collected by Weakley on certain notes, a list of which is set out in the answer, which had been delivered by him to Weakley for that purpose when he executed the note sued on; and that Weakley held the note sued on, as owner till long after it matured, and till a short time before this suit was brought, and then transferred it to plaintiff for the purpose of cheating him, Smith, out of two payments, under the false pretense that the plaintiff had taken the note before maturity for value. This was the only defense, based on payments, contained in the answer. The plaintiff replied denying all the material allegations of the answer. The case was submitted for trial to a jury, and the bill of exceptions alleges that each party gave evidence conducing to prove the facts relied on by them in their respective pleadings. The bill of exceptions also shows that the defendant offered to prove that on several occasions, and at several times, money had been paid to the plaintiff by way of *bonus* for an extension of the time on the note sued on; that by agreement between the parties, this money so paid was not to be a payment on the note, but simply as a *bonus* for further extension of the time of pay-

ment. This evidence was objected to by the plaintiff upon the ground that there was no foundation in the answer or pleadings for its admission. The court sustained the objection and the defendant excepted.

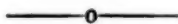
At the instance of the plaintiff the court gave three instructions to the jury. The first two were not objected to, and therefore need not be set forth here. The third which was objected to, reads as follows: "Third, the jury cannot allow in this case any pretended payment or credit for monies paid by defendant Smith as a *bonus* or premium for the extension of the time of payment of the note sued on, which by agreement of parties was not to be credited on said note."

The defendant asked five instructions, the second and third of which were refused, and the others given. The second instruction raised the same question presented by the third instruction given for plaintiff, asking that credit should be allowed for money given as a *bonus*, for extension of the time of payment of the note sued on. The third instruction of defendant which was refused, asserted "that if Weakley collected any of the notes delivered to him as collateral security for the note sued on, and failed to pay the money as collected on said note, such failure was a misappropriation of said money for which Smith is not responsible." The other instructions given on both sides presented the issues fairly to the jury and are not complained of and need not be noticed.

The third instruction given for plaintiff, and the defendant's second instruction which was refused, and the rejected evidence present the only material question necessary for us to consider. The point is whether the defendant Smith, should have been allowed as credits or payments on the note sued on, such sums of money as he paid for extensions of time. There was no foundation laid in the answer for the admission of the evidence concerning these alleged payments. The answer sets up no such payments, and the evidence was properly rejected on that account; but viewed in any light,

they could not be used as credits or payments on the note sued on. If they be treated in the light of usurious interest paid for the extension of time, they could not be recovered back or applied as credits on this note. (Perrine vs. Poulson, 53 Mo., 309; Ransom vs. Hays, 39 Mo., 445.) The third instruction for the defendant which was refused, was not a correct proposition of law, as applied to this case. This was a negotiable note alleged to have been indorsed to the plaintiff before maturity for value, and the question whether it was so indorsed is wholly ignored by this instruction. If the plaintiff was an innocent purchaser of the note without notice, he could not be affected by the failure of Weakley to pay over the money he collected for defendant Smith. Upon the whole record I think the judgment was for the right party.

Judgment affirmed, Judge Vories did not sit; the other judges concur.



THOMAS S. MOREMAN, Appellant, vs. P. H. TALBOTT, Respondent.

1. *Land and land titles—Improvements on property—Claimant standing by and permitting—Courts of equity will not interfere, when—Estoppel.*—Where one claiming the title to land is guilty of gross laches, and with full knowledge of his own claim allows the opposite party to expend his money, or waits until the property has largely increased in value, either from this or other causes, before asserting his rights, courts of equity are very reluctant to interfere, although there may be no bar of the statute.

Appeal from Nodaway Circuit Court.

Johnston & Royal, and G. D. Burgess, for Appellant.

I. Appellant is not estopped by anything he said or did prior to or at the time of the sale of said land under the County Court judgment.

To constitute an estoppel *in pais*, the act or admission relied upon to have that effect, must be the moving cause and

inducement, in the absence of which the party setting it up would not have done that upon which he claims the estoppel. (Hill vs. Epley, 31 Penn. St., 334; 2 Washb. R. P. [2nd Ed.], 459, § 9a, to ref. 5.)

The cases, says Mr. Washburne, all agree in this, "that no man can set up another's act or declaration as a ground of estoppel, unless he has been misled or deceived by such act or declaration; nor can he set it up where he knew or had the means of knowing the truth of the act or declaration in his own power." Both Roseberry and Talbott had knowledge of Moreman's interest, and were fully advised of the true state of the title. (2 Washb. R. P. [2nd Ed.], 460 § 9a; 2 Sm. L. Cas. 6 [Am. Ed.], 768.)

To enable a man to set up title by estoppel, he must have been ignorant at the time of his purchase of the true state of the title, and also been without the means of ascertaining it by a reference to the records. (Rice vs. Bunce, Adm'r, 49 Mo., 231; Wood vs. Griffith, 46 N. H., 237; Grove vs. White, 20 Wis., 430; Hill vs. Epley, *supra*; Herm. Est., p. 421, § 422; Titus vs. Morse, 40 Me., 348; Hill vs. Mossman, 11 Ohio St., 42.)

II. No time short of ten years adverse possession will bar in such case as the present, as equity acts in analogy to the law. (Ward vs. VanBokkelen, 1 Paige Chy., 100; Angel on Lim., [6th Ed.], §§ 25, 26, 382; McNair vs. Lott, 25 Mo., 190; 20 Mo., 93, 94, 95; Sto. Eq. Pl. [2nd Ed.], § 757; 50 Mo., 102, 103; *Id.*, 445.)

Allen Vories, for Respondent.

I. If a party by his words or conduct, as in the present case, induce another to lay out his money and expend his means in the purchase of lands, which he would not have done otherwise, then such party is "estopped" by his own conduct. (Clark vs. Huntsucker, 12 Mo., 333, 339, 340; Highley vs. Barron, 49 Mo., 103; Rice vs. Bunce, Adm'r, 49 Mo., 231, &c., and authorities there referred to; Chouteau, &c., vs. Goddin, &c., 39 Mo., 229; Newman vs. Hook, 37 Mo., 207; Rutherford vs. Tracy, 48 Mo., 325.)

NAPTON, Judge, delivered the opinion of the court.

This was a proceeding to have defendant declared a trustee for plaintiff, as to the title to a tract of land in Nodaway county, and to compel a transfer of the defendant's legal title to plaintiff.

Most of the facts in the case are undisputed. It appears from the pleadings and evidence, that one Davis bought a quarter-section of the 16th section at one dollar and a quarter per acre, on the 30th of October, 1856, at a sale by the sheriff made by order of the County Court, and received the sheriff's certificate to this effect; that upon payment of the purchase money he was entitled to a deed; that Davis' note or bond for the purchase money, with one Roseberry as his surety, was not executed until 1858; that on the 24th of February, 1857, Davis, before the execution of any note or bond to the county, so far as appears, and certainly before the payment of any part of the purchase money, executed a fee simple deed with warranty, of the land to the plaintiff, who then lived in Kentucky, and this deed was duly recorded in Nodaway county on the day of its date.

It appears that the note or bond given by Davis and Roseberry, remained unpaid until 1864; the plaintiff in the meantime having removed from Kentucky to Nodaway county some time in 1859, and the County Court at the instance of Roseberry (who was surety for Davis), treating the note as one for school money and coming within the provisions of the 29th section of the second article of the act concerning Common Schools (R. C. of 1855, p. 1425), entered a judgment against Davis and Roseberry for the principal and interest of this note, then amounting to over \$300; and an execution was levied on the land, and the land bought at this sale by Roseberry and defendant, Talbott. The purchase money was then paid to the county, and the County Court thereupon directed the Clerk to make report to the Register of Lands of the sale to Davis, and to report Roseberry and Talbott as his assignees. And accordingly, a patent was issued from the State to Roseberry and Talbott. The defendant, Talbott, ultimately bought out the interest of Roseberry.

It appears, that after the removal of plaintiff to Nodaway, in the Spring of 1859, all the parties to this transaction lived in that county; that Davis did not leave the county until 1864, and at that time was apparently in good circumstances pecuniarily.

It appears that Roseberry and Talbott were fully apprised of the deed from Davis to plaintiff, and that plaintiff was equally cognizant of the fact that Davis had not paid for this land, and of all the proceedings of Roseberry, the County Court, the sale under execution, and the purchase by Roseberry and Talbott.

In 1863, Roseberry spoke to the plaintiff in regard to this note of Davis', and the necessity of plaintiff paying it off in order to get the title from the State; but the plaintiff refused to do so, declaring that he had already paid much more than the land was worth, and that Davis had swindled him, and he would sue Davis on his warranty. Roseberry told the plaintiff, that to save himself as surety of Davis, he would be obliged to buy in the land at the sale, unless he, the plaintiff, would do so; but the plaintiff declined and did not attend the sale, or if he did, made no bid for the land. The defendant, Talbott, also had repeated interviews with plaintiff before he bid at the sheriff's sale, and told the plaintiff he would not buy if the plaintiff desired to bid. Talbott knew nothing of the orders of the County Court, but, as he says, owning some land adjoining, he was induced to buy by the repeated assurances of the plaintiff. There is nothing contradictory of these statements by the defendant, Talbott, and Roseberry, from whom he purchased, or in the testimony of plaintiff, who was examined as a witness. The main facts are admitted or not denied, though the plaintiff does not remember all the conversations, and does not admit everything said by the defendant, and the witness, Roseberry.

It may be remarked, that all the allegations in the petition concerning fraudulent combinations and devices on the part of the defendant and Roseberry, and the County Court and Clerk, are utterly without foundation. There was no evi-

dence whatever offered tending to show the slightest appearance of fraudulent intent or fraudulent acts on the part of any one concerned in the matter. After all the evidence had been heard, the court dismissed the petition, and this judgment is brought here for review.

This suit, it may be here remarked, was commenced in 1871, fifteen years after the sale to Davis, and fourteen years after Davis' deed to plaintiff.

It may be conceded that the proceedings in the County Court on Davis' note were not authorized by the statute, that the judgment, execution, levy, sale and deed, were all nullities; though we do not mean to declare that the judgment was, since it is not entirely clear, that the court could not have treated this note for school land as belonging to the school fund of the township, and therefore subject to be enforced in the same prompt manner as loans of the school fund could be. The levy, sale and deed of sheriff were undoubtedly void, as Davis had no interest in the land either equitable or legal. We have not however examined this matter sufficiently to venture any opinion in regard to the judgment, because we regard all these facts as beside the case and totally immaterial.

The leading and important facts are, first: That Roseberry and Talbott, paid the purchase money, and received the patent from the State, and have now the legal title. What was the equity of the plaintiff on his deed from Davis? He can only occupy the same place that Davis did, and Davis had merely bid \$200 for the land, and got a certificate from the sheriff to that effect, which assured him of a conveyance from the State, when this purchase money was paid. He does not pretend that he ever paid this purchase money or any part thereof, nor that his grantor Davis, did. On the contrary, the facts and pleadings show that neither of them ever paid any part of this purchase money, but that Roseberry and Talbott did, though perhaps, in an irregular and informal way; and it appears clearly, not only that plaintiff did not pay any part of this purchase money which enabled the defendant to get a patent, but that he positively refused to do so.

Moreman v. Talbott.

The plaintiff could surely have no standing in a court of equity unless he tendered or offered to pay the \$312.00, and interest. That would be nothing more than the leading maxim in equity. Courts require that one asking for equity, must himself first do what is equitable, and this would certainly be to repay the expenditures of defendant, made on the faith not merely of plaintiff's words, but of his acts. But apart from this failure to offer to pay defendant the purchase money he advanced, we think there are other fatal objections to this petition which authorized the court at the hearing, to dismiss it. The laches of the plaintiff in this case is inexcusable, and is not favored by courts of equity. Fourteen years passed from the date of his deed, and seven years passed after the acquisition of title by the defendant, and this, with a full knowledge on the part of plaintiff of all the facts on which the application for relief is now based. Undoubtedly, where a complainant is ignorant of the facts upon which his right is based; where he has used ordinary diligence to discover them; where his adversaries have managed to conceal them, or where frauds have been perpetrated which he did not sooner discover, a certain degree of delay may be excused, and will not prevent the courts from affording relief. I am not speaking of the statute of limitations, but where a party is guilty of gross laches and allows the opposite party to expend his money, or waits until the property has largely increased in value, either from this expenditure or other causes, courts of equity are very reluctant to interfere, although there may be no bar of the statute.

Here, seven years passed after Roseberry and Talbott bought this land and procured a patent from the State for it, and not a word is said by the plaintiff until this suit is brought. Plaintiff and defendant and Davis all lived in the same county. The condition of the title was known to all of them. This delay would tend to show that the reported statements of plaintiff to Roseberry and Talbott, were true, and that the plaintiff did expect to rely on Davis' warranty, and did not intend to look to the defendant for redress. This suit seems to have resulted from a recent change of determination,

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perhaps occasioned by the hopeless insolvency of Davis, which however occurred subsequent to the acquisition of title by Roseberry and the defendant.

The subject of estoppel is extensively discussed in the brief filed in this case. The facts certainly are very similar to those in the case of Huntsucker vs. Clark, 12 Mo., 333; but we think it unnecessary to express any opinion on this point.

The fatal objections to the suit are that no offer is made to pay the purchase money, and that the laches of the plaintiff under the facts and circumstances of the case, precludes his right to any aid from a court of equity.

Judgment affirmed. Judge Vories not sitting, the other judges concur.

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AMANDA CORBY, Executrix, etc., of JOHN CORBY, deceased,
Respondent, vs. SQUIRE T. BUTLER, Appellant.

1. *Promissory notes—Innocent holder for value, etc.—Antecedent equities.*—Fraud between the original parties to a negotiable note cannot be set up as a defense against a subsequent holder who took the note for value before maturity in the usual course of business, and without notice of the fraud.
2. *Promissory notes—Indorsee before maturity presumed innocent, etc.*—An indorsee of negotiable paper before maturity is presumed to be the owner in good faith and for value, in the absence of evidence to the contrary.
3. *Practice, civil—Instructions, evidence.*—Instructions not warranted by the proof are properly refused.

Appeal from Andrew Circuit Court.

Vineyard & Young, for Respondent.

Loan & Van Waters, for Appellant

ADAMS, Judge, delivered the opinion of the court.

This was an action on two negotiable promissory notes, which had been executed by the defendant to one S. P. DeWolf. Both are made payable to S. P. DeWolf or bearer, for value received, each for \$190, and dated at Clinton county

Mo., July 30th 1869; one payable six months after date, and the other one year after date. The petition alleges that the plaintiff's testator bought the notes for value before maturity. The answer does not deny the execution of the notes, but alleges that they were fraudulently obtained from the defendant, and sets out the facts constituting the fraud; and alleges that the plaintiff's testator did not take the notes in the usual course of trade for value and without notice of the alleged fraud. On the trial, the plaintiff gave evidence tending to show that the testator loaned DeWolf money, and took his notes for the loan, and as part of the same transaction took these notes as security for the loan before their maturity. The defendant then offered to prove the facts, set up in his answer, constituting the fraud, which the court excluded upon the ground that it appeared that the notes had been transferred to the testator by delivery, for value before maturity, and to this ruling the defendant excepted.

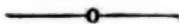
At the instance of the plaintiff the court instructed the jury, "that under the pleadings and evidence in this case they should find for the plaintiff, and assess her damages at such sum as they might believe from the evidence is due her on the notes sued on, not exceeding the amount due plaintiff on the notes of DeWolf, which were read in evidence." To the giving of this instruction the defendant excepted. The jury found for the plaintiff and the defendant filed a motion for a new trial which was overruled, and he has appealed to this court.

The court committed no error in excluding the testimony offered by the defendant, to prove the alleged fraud in procuring the notes. There was no foundation laid for the introduction of such proof. There was no evidence tending to show that the testator took the notes without value, or after maturity, or not in the usual course of trade, or with notice of the alleged fraud. It would have been improper to admit evidence of the fraud without first laying a foundation for its admission.

The plaintiff's testator was an indorsee by delivery of the notes sued on before maturity. The notes were payable to

bearer and their delivery to the testator constituted a valid transfer of the legal and equitable title. As this transfer was made before maturity, in the absence of evidence to the contrary, he must be presumed to be an innocent holder for value. (See *Horton vs. Bayne*, 52 Mo., 531.) As the defendant offered no evidence to impeach the testator's innocence as holder of the notes, the instruction which the court gave for plaintiff was in the nature of a demurrer to the defense as proved or offered to be proved, and was therefore a proper ruling as this case stood before the court. The defendant asked two instructions which were properly refused, as they were not warranted by the proof. Upon the whole record, the judgment was for the right party.

Judgment affirmed. Judge Vories did not sit; the other judges concur.



JOSIAH LEE, Appellant, vs. EVAN B. BOWMAN, et al., Respondents.

1. *Ejectment—Proceedings for compensation for improvements—Notice—What sufficient—Rents and profits—Damages for waste, etc.*—In proceeding under the statute, (Wagn. Stat., 561-2, §20, et seq.) by one against whom judgment had been obtained in ejectment, for improvements made by him "in good faith," prior to his having had notice of the adverse title, *held*, that the "notice" contemplated by the law, which would defeat plaintiff's claim for improvements thereafter added, was not confined to the notice in writing mentioned by § 28, but embraced any such information as would put a man of ordinary prudence upon inquiry.

In such proceeding defendant would not be entitled to recover by way of counter-claim rents and profits, or to recover damages for waste and injury prior to the rendition of judgment in the ejectment suit.

Appeal from Daviess Circuit Court.

The Appellant—plaintiff below—after recovery against him in ejectment by the respondents, brought this suit to recover the value of his improvements on the land so recovered, and enjoined the respondents from entry and possession, until the

determination of this suit by injunction. For statement see also opinion of court.

McFerran & Davis, for Appellant.

I. The court below erred in admitting testimony against the appellant's objections, conducing to prove an equitable notice to appellant of respondents' claim of title, at and before the making of the improvements sued for to bar plaintiff's right of recovery. The law contemplates a legal notice in writing. The notice required by the statute, and no other, would constitute a bar. (Wagn. Stat., 562, § 28.) The statute gives a remedy for a matter that was not actionable at common law, and at the same time provides the means for executing it. Hence it cannot be executed in any other way. (Potter's Dwar. Stat., 275, n. 5, and cases cited.)

II. The court below erred in admitting testimony to go to the jury of damages, waste, rents and profits against appellant's objections. Such damages, &c., could only be recovered in the original action of ejectment. (Cochran vs. Whitesides, 34 Mo., 417; Beal vs. Harmon, 38 Mo., 435; Wagn. Stat., 560, § 13.)

III. The court below erred by instructing the jury in effect that equitable notice was a bar to appellant's claim for improvements, without reference to his good faith and belief, and by refusing the appellant's instructions to the effect that his right to recover in the absence of a notice in writing according to the terms of the statute, depended on the appellant's good faith at the time of making the improvements, and his belief that he had good title to the land. (Wagn. Stat., 561, §§ 20, 21; Dothage vs. Stuart, 35 Mo., 251.) Equitable notice might go to the jury upon the question of plaintiff's good faith, but could not operate of itself as a bar.

Daniel Metcalf, for Respondents.

I. The statute does not contemplate a written notice. (Russell vs. DeFrance, 39 Mo., 506; 2 Sngd. Vend., § 56; Blackw. Tax Tit., 587, 588; 2 Sto. Eq., 799*a* and *b*, and note 1; 2 Sngd.

Vend., 523-5. See also VanHorne vs. Fonda, 5 Johns. Ch., 388; Gillespie vs. Moon, 2 Johns. Ch., 585; Patrick vs. Marshall, 2 Bibb., 40; Ormsby vs. Hunton, 3 Bibb., 298; Barlow vs. Bell, 1 A. K. Marsh., 246; Howe vs. Logwood, 3 A. K. Marsh., 388; McKem vs. Moody, 1 Rand., 58; Pugh vs. Bell, 1 J. J. Marsh., 399; Baltimore vs. McKim, 3 Bland, 453.)

II. Appellant had such notice as to put a man of ordinary observation on his guard. If he had the means of knowledge within his power, and remained wilfully ignorant, then he cannot recover. (Speck vs. Riffin, 40 Mo., 405; Vaughn vs. Tracy, 22 Mo., 415; Blackw. Tax Tit., [2 Ed.] 588-590.)

III. Under § 13 p. 1016, Wagn. Stat., there can be no question as to the respondent's right to recover by the way of counter-claim for the wood, timber, &c., taken off the land by the appellant, during his occupancy. This could not have been recovered in the action in ejectment, because the most of the improvements were made since the judgment in ejectment, and most of the rents have accrued since that time. (Gordon vs. Bruner, 49 Mo., 570; Hay vs. Short, *Id.*, 139; Wagn. Stat., 1016, § 13; Grand Lodge vs. Knox, 20 Mo., 433; House vs. Marshall, 18 Mo., 368.)

SHERWOOD, Judge, delivered the opinion of the court.

E. B. Bowman and others recovered judgment in ejectment against Josiah Lee. Before, however, that recovery was made effectual by the usual writ, Lee under the provisions of the statute to that effect, instituted the present proceeding for compensation for improvements made, alleging in his petition those matters of statutory designation which entitled him to the relief sought. The defendants answered, controverting the material averments of the petition, and claimed by way of counter-claim or recoupment, that they were entitled to recover of the plaintiff for the rents and profits of the premises sued for, and for the waste and injury committed thereon by the plaintiff; but the answer did not allege at what period the waste and injury were

done, nor designate the time from which the rents and profits were to be computed, whether prior or subsequent to the termination of the action brought by the defendant. A jury was impaneled and the parties went to trial, but in consequence of the adverse rulings of the court, the plaintiff took a non-suit, and has brought this case here by appeal.

Passing by certain minor points exhibited by the record, we will devote ourselves to the discussion of those which alone are deemed worthy of specific mention. The court below was clearly right in its construction of those sections of the statute upon which plaintiff's claim was founded. The very existence of that claim depended on the question whether the improvements for which compensation was asked, were made "in good faith;" and as this phrase has an equitable origin, resort must be had to works on equity jurisprudence to ascertain under what circumstances, the phrase is applicable; and an examination of these authorities will show beyond question, that notice and good faith cannot co-exist. For it is an equitable doctrine of universal recognition, that he who takes with notice of the claim of another, takes subject to that claim. Notice in this connection, does not mean direct and positive information, but anything calculated to put a man of ordinary prudence on the alert, is notice. So that it will be readily perceived, that the statute under consideration by the adoption of the terms "notice" and "good faith," adopted them with the full force and meaning which attached to them as inseparable incidents in that system of jurisprudence from whence they were derived. If the testimony adduced in this case by the defendants deserves credence, there can be no room for doubt that the plaintiff before he purchased the land sued for, received information of such a character as ought to have compelled investigation. No notice in writing was necessary in order to put him on inquiry. After the clue was furnished him, he was manifestly chargeable with knowledge of all those facts to which that clue, if properly followed, would have led. The sole object of § 28 of the ejectment Act, was to furnish a mode whereby the "occupying claimant" could be conclusively bar-

red and cut off from recovery for improvements made, after being notified in the manner in that section prescribed, thus leaving the equitable doctrine as to notice, incorporated in the prior provisions of the act referred to, entirely unaffected by anything in that section contained. Any other conclusion than this, would defeat the manifest purpose which induced the passage of the act, and be reached at the hazard of the grossest injustice. It would be in effect saying to the occupying claimant: "make all the improvements you desire on the land of another and your compensation for them is secure, so long as your knowledge of a title superior to your own, does not assume the shape of a written notice." The law never intended, and will not tolerate any such absurdity.

So far then as concerns the points just discussed, no ground for a reversal is seen.

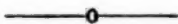
There was evident error, however, in not rejecting all the evidence offered by defendants concerning rents and profits in support of their counter-claim; and in not confining their evidence as to waste and injury, to a period subsequent to the rendition of the judgment in ejectment. And the very plain provisions of §§ 13, 15 and 16, of the ejectment Act, conclusively show this. For § 13 provides, that the prevailing plaintiff "shall recover damages for all waste and injury, and by way of damages the rents and profits, down to the time of assessing the same." And § 15, under circumstances like those which attended the judgment recovered by the defendants in their action for possession, requires the jury to "find the monthly value of the rents and profits." Now it is an obvious fact, that the finding of the jury in this regard would be utterly devoid of meaning, unless it were designed as the basis of some future computation. And this idea finds abundant confirmation in the requirements of § 16, that where the plaintiff recovers judgment for the premises, he shall also recover "the damages assessed, and the accruing rents and profits at the rate found by the jury, from the time of rendering the verdict until the possession of the premises is delivered to the plaintiff." The result therefore of the

Walden v. Bolton, et al.

judgment in favor of the defendants, was to merge and include in such judgment, all injuries resulting from the adverse occupancy, the accruing rents and profits down to the time of obtaining possession, and the damages for waste and injury at the time of the assessment thereof. But in the very nature of things the verdict could not be anticipatory of waste and injury in future; and for this reason such matters would obviously be proper subjects for recoupment or counter-claim, and evidence relating thereto unquestionably admissible.

No errors, other than those above mentioned, have been observed, but on account of those the judgment must be reversed and the cause remanded.

The other judges concur.



WILLIAM W. WALDEN, Respondent, *vs.* JESSE A. BOLTON
AND ROBERT M. GRAHAM, Appellants.

1. *Attorney and client—Authority to make compromise of suits, etc.*—The general rule is that an attorney cannot, by virtue of his general authority or employment to conduct a suit, bind his client by bargains or contracts to compromise or settle the cause of action; and particularly where land is received in satisfaction of the judgment to be recovered; unless some authority or sanction, either express or implied, has been given by his client for the purpose; or unless his conduct has been ratified by his client.
2. *Attorney—Admissions of, when binding upon client.*—Admissions, made by an attorney long after a case has been tried and his employment has ended, are not binding upon his client and are wholly incompetent.

Appeal from Livingston Circuit Court

Broadus & Pollard, for Respondent.

Wm. D. McGuire and A. S. Harris, for Appellants.

VORIES, Judge, delivered the opinion of the court.

This action was brought by the plaintiff against the defendant, Bolton, as the plaintiff in an execution, and the defendant, Graham, who is the sheriff of Livingston county, having

said execution in his hands to be executed, to restrain and enjoin a sale of land belonging to the plaintiff and levied on by said execution, on the ground that the judgment, upon which the execution was issued, was satisfied.

The petition in substance, charges, that previous to the 8th day of July, 1863, defendant, Bolton, was the holder by assignment of three several promissory notes, which had before that time been executed by plaintiff to one Caleb S. Stone, and assigned by said Stone to defendant, Bolton, which said notes were for the payment of two hundred and twenty-five dollars each; that said notes were executed to said Stone for and in consideration of a tract of land in the petition described; that on the 8th day of July, 1863, defendant, Bolton, recovered a judgment against the plaintiff on said notes, in which said judgment or decree, the vendor's lien on the land for which the notes were given was foreclosed, and said land ordered to be sold for the payment of said judgment; that on the 24th day of October, 1864, an execution was issued on said judgment, and on the 18th day of May, 1865, said judgment and execution were fully satisfied and discharged in the following manner: "This plaintiff agreed with defendant, Bolton, that Bolton would purchase or cause to be purchased the N. 1-2 of the N. E. 1-4 of the N. E. 1-4 of Sec. 7, Township 57, Range 23, situate in said county and State, the real estate of this plaintiff and which was levied upon to satisfy said judgment, and was advertised to be sold on said 18th day of May, 1865, by G. Harker, the then sheriff of this county, the same being the consideration for which the two last described notes were executed, and for the payment of which, defendant, Bolton, had obtained an order of this court for a sale of said property last described, for the enforcement of the vendor's lien, as the assignee of said Stone * * * and for the further consideration, that this plaintiff should make no further claim or demand off of said Stone for \$140, which they, the said Stone and Bolton were owing this plaintiff; that said Harker, as sheriff as aforesaid, did expose the last described realty for sale on the said 18th day of May, 1865, and in pur-

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ance of said agreement between this plaintiff and said Bolton, he, Bolton, procured one Mary Smith to purchase said realty at the nominal price of \$310, no part of which was paid by her or any one for her, or by defendant, Bolton, except the sum of \$32 95-100, the cost of said Harker in making said sale, which was paid by said Bolton; that defendant, Bolton, caused said property to be purchased according to the said agreement, *and released* this plaintiff of any and all further liability thereby to him upon said judgment."

It is further charged, that the land so purchased was of the full value of the amount due by said judgment, and was so estimated by the parties and was received and accepted by Bolton as a full satisfaction thereof; that Bolton now holds and controls the land; that he still holds said judgment against plaintiff without having satisfied the same further than to enter a credit thereon for the small sum bid for said land, at the sale aforesaid, and threatens to collect the same from plaintiff; that said judgment by the said acts and agreements of the parties has become in law and equity fully satisfied; that on the 20th day of June, 1871, defendant, Bolton, procured an execution to be issued from the Clerk's Office of the Circuit Court of Livingston county on said judgment, against the property of plaintiff and in favor of defendant, Bolton, which execution has been placed in the hands of the defendant, Graham, as sheriff of said county for collection, and which has been levied on lands of the plaintiff which are described in the petition, and which lands have been advertised for sale by said Graham as sheriff of said county, on the 15th day of December, 1871, to satisfy said execution; that said Graham, if not restrained by this court, will proceed to sell said land so levied on and advertised under the execution now in his hands; that a sale so made will work great and irreparable damage to plaintiff, for which he has no adequate remedy at law, and will be and constitute a cloud on the title of the land so to be sold.

It is further charged, that the defendant, Bolton, resides in a portion of the State remote from the residence of the plain-

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tiff, and if the injunction is not granted, plaintiffs will be compelled to seek a partial remedy by suit at law in the county where defendant resides, which would be attended with great expense and inconvenience; that plaintiff is a man of moderate means and unable to expend large sums of money in such litigation; that the attempt on the part of defendant to sell said land under execution is made for the purpose of harassing plaintiff, and by such fraudulent means to recover the amount of said judgment from defendant twice; he well knowing that plaintiff is a man of limited means, and unable to litigate with a man of plaintiff's wealth.

Plaintiff prays judgment that the defendant, Graham, may be restrained from any sale of the land under said execution, and that defendant, Bolton, be perpetually enjoined from further proceeding in the collection of the same, and for general relief.

To this petition the defendant, Bolton, filed an answer specifically denying every material allegation therein. Subsequently to the filing of the answer defendant filed a motion to dissolve the injunction which had been temporarily granted in the cause, because the petition was untrue, and because there was no equity shown in the petition. Upon this motion a trial was had and the court rendered a final decree in the cause against the defendants, perpetually enjoining and restraining the defendants as prayed for in the petition. In due time the defendant, Bolton, filed a motion for a new trial, which being overruled by the court, he excepted and appealed to this court.

The principal ground of objection to the action of the Circuit Court, insisted on by the defendant in this court is, that the court admitted improper evidence to be given on the part of the plaintiff, although said evidence was at the time objected to by the defendant. The case, contrary to the usual practice in such cases, seems to have been tried upon affidavits of the parties and of the witnesses filed by the respective parties, but no objection was made by either party to that mode of trial.

It is shown by the affidavit of the plaintiff, that the suit

upon which the judgment was obtained, upon which the execution was issued, the proceedings under which are sought to be enjoined, was commenced in April, 1861; that plaintiff and the attorney of defendant (who was plaintiff in that case) had made a mutual arrangement in that case, that the suit should be commenced for the purpose of enforcing said Bolton's, vendor's lien, against the land in that suit named; that the plaintiff—defendant in that suit—was insolvent, and not able to pay his debts; that the object of the suit was that the lien should be enforced, and Bolton take the land; that after the suit was commenced, there was a difference of understanding between the attorney of Bolton and plaintiff (who was defendant in that suit), when plaintiff filed an answer in that case; that during the progress of that cause, and before judgment, William C. Samuel became the attorney of record for Bolton in that suit; that the said Samuel, who knew the condition of the plaintiff financially, proposed to plaintiff, that if he would let judgment go by default for the amount of Bolton's demand, he—Bolton—would take the judgment enforcing the lien against said land in extinguishment of the debt; that at said time plaintiff had a claim against Bolton and Stone, who was the assignor of the notes on which the suit was brought, which plaintiff agreed to relinquish as a part of said agreement, if Bolton would take a judgment to enforce the vendor's lien on said land, in satisfaction of the demand; that said agreement was acted on by plaintiff and said Samuel, who was the attorney in fact and of record for said Bolton; that plaintiff in consideration of said agreement, let judgment be rendered against him by default in said action, for the sum of \$987.18; that a portion of the land, against which the lien was foreclosed, was sold by one Gudgell, who was then sheriff of Livingston county, in November, 1864, for the sum of \$378.79; that the residue of said land was offered for sale by one Harker, as sheriff of said county, and was bid in at said sale by William C. Samuels, Bolton's attorney, in the name of Mary Smith, at the nominal sum of \$310; that var-

ious persons were at said sale for the purpose of bidding for said land, but said Samuels, as the attorney of said Bolton, publicly announced, that the land would be bid in to satisfy a vendor's lien, and that the plaintiff in the execution, would take the same in satisfaction of the debt; that said notice by Samuels, prevented persons from bidding on said land, who would otherwise have bid on the same a sufficient sum to have satisfied said debt or judgment; that the land sold at the time was worth more than enough money to satisfy the balance due on said judgment and execution.

The evidence of plaintiff further tends to prove, that he had a good defense to said suit, which was abandoned by virtue of his agreement with Samuels.

The defendant at the time objected to so much of the foregoing evidence, as purported to recite a conversation with William C. Samuels, because said part of said evidence was hearsay and incompetent. The court overruled the objection and admitted the evidence.

It is objected in this court, that the court below erred in admitting the statement of Samuels in evidence, on the ground that such evidence is mere hearsay evidence and incompetent. This must depend entirely on the question, whether the arrangement, which it is attempted to prove was made between Samuels and the plaintiff, came within his general authority as an attorney. The general rule is, that an attorney cannot by virtue of his general authority or employment to conduct a suit, bind his client by bargains or contracts, to compromise or settle the cause or action, and particularly in such a contract as is attempted to be proved in this case, where land is to be received in full satisfaction of the judgment to be recovered, unless some authority or sanction has been given by his client for the purpose, either expressed or implied, or unless his conduct has been ratified by his client. (1 Pars. Cont., 117; North Mo. R. R. Co. vs. Stephens, 36 Mo., 150.) In order to make the evidence of the arrangement made with Samuels, competent against Bolton, there should have been some evidence introduced, tending to prove

his authority to make the compromise or that it had afterwards been ratified or sanctioned by Bolton.

There is another objection to most of the evidence contained in the affidavit of Walden, which has not been raised by the parties in the cause. The most of said evidence, tends to prove an entirely different agreement from the one stated in the petition. It is charged in the petition that, on the day that the land was to be sold by the sheriff, plaintiff had an agreement with Bolton, by which, Bolton agreed to purchase or cause to be purchased the land named, in full satisfaction of the judgment; and that in conformity with the agreement, Bolton had caused the land to be purchased, etc.; and that Bolton had refused to satisfy the judgment, although he had kept the land purchased, which was of a value more than sufficient to pay the entire judgment; that the land under this agreement was purchased for a nominal sum, etc. There is no mention made in the petition of any agreement made with Samuels, by which he was caused to forego his defense to the suit, or of the conduct of Samuels at the sale, by which persons were prevented from bidding on the land: But inasmuch as the evidence was not objected to by the defendant on the ground of variance, that question will not be raised here so as to reverse the judgment on that ground alone.

The plaintiff also read in evidence on the trial of the cause, the affidavit of one Smith Turner, by which it was testified, that the said Turner, some two years before the trial, was requested by Col. Stone to take charge of the judgment of Bolton vs. Walden; that he was requested to have an execution issued on the judgment; that witness had failed to find the judgment on the record; that he learned that W. C. Samuels had been of counsel in the case; that he went to Samuels for information; that Samuels gave him to understand that he was in the case, but witness did not recollect for which party he said he had been employed; that Samuels told witness, that the case was all wrong and oppressive against Walden. He stated that the suit had been com-

promised in the court in which it was tried; that Walden had been induced to and did withdraw his defense in consideration of the compromise; that he could not recollect that Samuels had told him what the compromise was; it was rather the impression of the witness, that it was for a vendor's lien, and that Bolton was to take the land back. Witness further stated that after getting this information from Samuels, he had declined to act in the premises.

This evidence of Turner's was also objected to by the defendant, because the same was only hearsay evidence. The objection was overruled by the court, and the defendant excepted. It is difficult to imagine upon what ground this evidence was admitted. An attorney might bind his client in some cases by admissions made by him in the prosecution of a suit, in the course of his employment; but the admissions or statements of an attorney, who had been employed in a suit, several years after the case had been tried, and his employment, for all that appears, ended, certainly are not admissible in evidence, or otherwise binding on his client in the case, and are wholly incompetent evidence for any purpose. The evidence in this case was conflicting; the testimony of the defendant being in direct conflict with that given by the plaintiff.

In such cases it becomes important that no illegal evidence shall be admitted on either side. This merely hearsay evidence of Turner, being of a very material character, if legal, and having been wrongfully admitted, it follows that the judgment must be reversed. (*Golson vs. Ebert*, 52 Mo., 260.)

It may not be improper however, as the case will be remanded for a re-trial, to remark, that the facts which the plaintiff's evidence tends to prove, are at variance with the allegations in the petition—which defect may be obviated by an amendment. In fact the petition in this case is so prolix and so disconnected in its averments, that it is difficult to ascertain and separate the material from the immaterial averments therein, or ascertain the exact ground relied on for relief.

It seems to be a proper case for the court to require the

plaintiff to make the averments in his petition more definite and certain.

The judgment is reversed, and the cause remanded. The other judges concur.



JONATHAN G. FELLOWS, Appellant, vs. REMUS WISE, Respondent.

1. *Land titles—Purchase—Notice putting on inquiry, etc.*—If a purchaser of land has such information touching certain facts as would put an ordinarily prudent man on inquiry in relation thereto, he is affected with notice,
2. *Practice, civil—Instructions, etc.*—Instructions not based on evidence, should not be given.

Error to Linn Circuit Court.

A. W. Mullins, for Appellant.

W. H. Brownell and G. D. Burgess, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

This was an action of ejectment to recover a tract of military bounty land in Linn County. The suit was commenced on the 27th of Sept., 1869.

The facts appearing at the trial, about which there was no dispute or contradictory evidence, were about as follows: One Moore, about 1857, having purchased of Talton Turner a tax title, for which he gave his note to said Turner, went into possession of the land in controversy. In 1859, the plaintiff, who then lived in Davidson county, Tennessee, and had some claim to this tract, came out to Missouri and negotiated with Moore for the purchase of said Moore's title and improvements, which resulted in the execution of a penal bond by Moore, binding him to convey to Fellows the land in controversy, together with all improvements on it, for the sum of \$475, for which sum Fellows executed his note, payable on the 1st of March, 1860; and agreed also to pay to the estate of

Talton Turner, the further sum of \$200 together with interest which was due by said Moore, to said Turner. This title bond was executed on July 30th, 1859, and was recorded in the Recorder's office of Linn county, on the 1st of August, 1859, but the acknowledgment was not taken according to law.

This money, the \$475 due Moore, was all paid by Fellows or his agent, to Moore, previous to his death, which occurred in 1866, and in that year, the \$200 due to Turner was also paid to Turner's executors, who executed a deed to Fellows.

In Sept. 1869, the County Court, on the application of plaintiff, ordered a specific performance on the part of Moore's administrator, and a deed was accordingly executed dated Sept. 20th, 1869. Previous to this, on the 29th of Dec'r, 1868, a deed was executed by the heirs of Moore, to one Brownlee—a quit-claim deed for the consideration of \$450—and subsequently, another conveyance, not given in evidence, was executed by Brownlee to one Richardson or Vorce, or both; and the defendant is a tenant under this title.

The other testimony in the case, relates to adverse possession and actual notice, and need not be particularly stated, except so far as to determine the propriety of the instructions given by the court. There is really no question of adverse possession in the case. Moore's occupancy after his sale to plaintiff, and the new house he built in 1860 or 1861, were by the consent of the plaintiff, and as his trustee; and as there is abundant evidence of his disclaiming any title, and no contradictory evidence, except the hearsay testimony of his son-in-law that Moore said he drove Fellows off the place on one occasion, when Fellows was there after the war, with a handspike. Barton the agent of Fellows, states that Moore suggested to Fellows the necessity of his having a better house than the shanty then on the place, and Fellows told him to build one, and that if he wished to remove it afterwards he could do so.

In regard to notice of Fellows' title, by the purchasers from Moore's heirs, the testimony is very strong. It seems that Burgess negotiated this sale; that he advised Moore's heirs

that their title was bad as against Fellows, but that an innocent purchaser would prevail and could hold it, and therefore told them to sell for what they could get. This is the statement of the son-in-law of Moore and of Burgess himself who was examined as a witness. The sale to Brownlee was made by Burgess, with the understanding that Burgess was to have an interest in the land. There is no dispute that Burgess knew of the title of plaintiff. He admits it, and so the subsequent sale of Brownlee to Richardson was negotiated by Vorce, who was also a partner in the profits of this arrangement, and who well knew, as he says in his testimony, that Fellows had bought Moore's improvements and paid him for them, but knew nothing, as he says, of the title-bond.

The instructions given by the court it is useless to rehearse in detail. Those given at the instance of the plaintiff were correct, and put very fairly to the jury every question of fact which the issues presented. But the court gave six or seven for the defendant, totally at variance with the instructions for plaintiff, and not based upon any evidence in the case. The first instructions are based upon the well settled rule, that if a purchaser has such information as would put an ordinarily prudent man on inquiry, he is affected with notice; and then the last set of instructions require the jury to find that the purchaser must have actual notice of the prior deed or bond. The last instruction on the subject of adverse possession for two years, had no evidence to support it. This suit was brought in September, 1869, and no disclaimer of plaintiff's title by Moore's heirs occurred, so far as the proof shows, until the deed made on the suggestion of Burgess in December, 1868. This might be regarded as a repudiation of the trust on the part of Moore's heirs; but the consummation of the plaintiff's title as a legal one never occurred till September, 1869, the same month in which suit was brought.

The judgment will be reversed, and the cause remanded. The other judges concur.

Seaton v. Chicago, Rock Island and Pacific R. R. Co.

THOMAS SEATON, Respondent vs. THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, Appellant.

1. *Practice, civil—Corporation, appearance of admits existence.*—A corporation, by appearing to a suit, thereby admits its corporate existence.
2. *Damages—Suit against railroads for, may be brought in name of party damaged—Jury may award double damages, when.*—Suit against a railroad company to recover double damages for injuries to stock, need not be brought in the name of the State under § 42 of the Railroad Statute (Wagn. Stat., p. 310), but may be instituted under § 43 thereof, in the name of the owner. Double damages, although looked upon as punitive, may be also treated as compensatory.

In such case the Supreme Court will not reverse the case, because double damages were awarded by the jury instead of the court, no harm resulting from such irregularity.

Appeal from Clinton Circuit Court.

J. H. Shanklin and M. A. Low, for Appellant.

I. Section 43 is penal (Sedgw. Const. Law, 41), and the action should have gone in name of the State. (Trice vs. Han. & St. Jo. R. R. Co., 49 Mo., 438; Iba vs. Han. & St. Jo. R. R. Co., 45 Mo., 469.)

William Henry, for Respondent.

I. The damages given by § 43 of the Railroad Act (Wagn. Stat., 310), although in the nature of a penalty, are given to the owner of the cattle injured or killed.

II. Section 42 is directory, not mandatory. (State to use, etc. vs. Hann. & St. Jo. R. R. Co., 51 Mo., 532.)

ADAMS, Judge, delivered the opinion of the court.

This was an action commenced before a Justice of the Peace, under § 43, Wagn. Stat., 310, for double damages for killing several hogs by defendant.

The plaintiff recovered a judgment before the justice, and the defendant took an appeal to the Circuit Court, when the plaintiff again had judgment, and the defendant appealed to this court, which reversed and remanded the case for a new trial.

The case was again tried before the Circuit Court, and again

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resulted in a judgment for the plaintiff, and the defendant has again appealed to this court.

On the trial in the Circuit Court, the plaintiff gave evidence tending to prove his case as stated, and also evidence of the corporate existence of the defendant. The defendant objected to the character of the evidence given to establish its corporate existence, but it need not be recited, as under the view we take, it was wholly unnecessary. The defendant had appeared from the commencement of the suit by its attorney, and was all the time in court, as a corporate entity, under the name by which it had been sued; and that was sufficient without any proof of its corporate existence. If a corporation appears to a suit, it cannot deny its own existence. It either exists or is a non-entity, and if it be a non-entity the whole proceedings would be *coram non judice* and utterly void. When a corporation brings suit, the defendant may deny it its legal existence, and thus render it necessary for its existence to be proven. But when the corporation appears as defendant, such appearance is conclusive evidence of its legal existence for the purposes of the pending case.

The objection is urged here, that this suit ought to have been brought in the name of the State, under Sec. 42, 1st Wagn. Stat., 310, which required all penalties imposed by that chapter to be sued for in the name of the State. But that section refers to penalties due to the State and not to punitive damages, which parties are entitled to recover under section 43 of the same chapter. The owners of stock injured by a railroad have always been allowed to sue in their own name for such injuries, and, in fact, they are the real parties in interest, and ought to bring the suit; and although double damages may be looked on as punitive, they are also treated as compensatory, and not as mere penalties which belong to the public. (State to use, &c. vs. Han. & St. Jo. R. R. Co., 51 Mo., 532; Hudson vs. St. L., K. C. & N. R. R. Co., 53 Mo., 525.)

The jury found a verdict for double damages, and judgment was given on the verdict as found. It is objected that

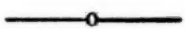
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the jury ought to have found single damages and left it to the court to double the damages by its judgment. That perhaps would have been more regular; but as no harm has been done the defendant by the course pursued, this court will not reverse the judgment for such an error.

The defendant also objects, that there were not separate findings for the several injuries complained of. If this was an error at all, it is not such as injured the defendant.

Upon the whole record, the judgment appears to be for the right party.

Judgment affirmed. All the judges concur.



CHAS. A. PERRY, *et al.*, Appellants, *vs.* RICHARD E. TURNER, *et al.*, Respondents.

1. *Corporations—Debts of, prior to repeal of "double liability clause"—Action against stockholder for debt of company—Constr. of §§ 22, Ch. 1, of corporation law—Liability of stockholder—Allegation as to insolvency and dissolution of company—Action when several—Contribution.*—The St. Louis & St. Joseph Railroad Company became indebted in October, 1870, prior to the repeal of the "double liability" clause of the constitution, in the sum of \$7,858. In suit against a stockholder for this amount, plaintiff, among other matters, alleged in general terms that the company had become insolvent, and dissolved in December, 1870.

Held, 1st; that under a proper construction of § 22 of Art. 1, of the statute touching Corporations, (Wagn. Stat., p. 293, construed in connection with §§ 32, 39, Ch. 38, R. C. 1855, and Art. 8, § 6 of Const.) defendant could not be held liable for the entire amount of the debt, but only in a sum equal to the amount of stock owned by him, together with the amount of his unpaid subscription;

2nd; that the general averment of the insolvency and dissolution of the company was sufficient without a further statement of the particular facts upon which the averment was based. (A formal surrender on a judgment of dissolution was not necessary in order to authorize the creditors to sue under § 22 *supra*.)

3rd; that suits of the above description, whether brought in law or equity will not lie against defendants jointly, but must be begun against each one severally, and under our law the stockholder thus compelled to pay, must resort to his remedy for contribution.

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2. *Constitution*—"Double liability"—*Acts to enforce, may be limited as to time.*—Statutes designed to carry out the "double liability" clause, (Art. 8, § 6 of the State Constitution, may limit the enforcement of such liability as to time.

Appeal from Buchanan Circuit Court.

Vineyard & Chandler, and White, for Appellants.

I. The court below erred in refusing to require the defendants to answer jointly, as their separate answers were exact copies of each other. (Wagn. Stat., 1017, § 14.)

II. The allegations of the petition are sufficient, in a proceeding like this, to show a dissolution of the corporation. (Slee vs. Bloom, 19 Johns., 456; Briggs vs. Penniman, 8 Cow., 387; Moore vs. Whitecomb, 48 Mo., 543; State Sav. As'n. of St. Louis vs. Kellogg, 52 Mo., 583.)

III. The liability of defendants for the debt due plaintiffs is that of original obligors, springing out of and co-existent with the contract between the St. Louis and St. Joseph Railroad Company and plaintiffs as its creditors. It may be conceded that, under our statutes, the right to enforce this liability was held in abeyance until the dissolution of the corporation; but that they became and were, concurrently with the company, from the inception of the debt, personally liable, there can be no question. (25 N. Y., 222; 57 Barb., 489; Conant vs. Van Shaick, 24 Barb., 87; Corning vs. McCullough, 1 N. Y., 47; Young vs. Rosenbaum, 39 Cal., 646; Windham Prov. Ins. vs. Sprague, 43 Ver., 502; Norris vs. Wrenschall, 34 Md., 492; Hawthorne vs. Calef, 2 Wall., 10; Prov. Sav. Ins. vs. The Jackson Place Sk. & B. Rink, 52 Mo., 552; Allen vs. Sewall, 2 Wend., 327; Moss vs. Oakley, 2 Hill., 265; Wright vs. Field, 7 Ind., 376; Middleton Bank vs. Magill, 5 Conn., 28; Adkins vs. Thornton, 19 Ga., 325.) And if the defendants are liable to plaintiffs for their debt due them from the company as original obligors, then, to the extent of that liability, they are jointly so liable, and under our statute any number of them may be sued in the same action.

IV. The language of that section of the statute under

which this suit was brought, (Wagn. Stat., 293, § 22,) plainly indicates the right of plaintiffs to sue in one common action all, or any number, of those who were stockholders of the corporation at the time of its dissolution. It declares that "suits may be brought against any person or persons, who were stockholders at the time of such dissolution;" and also "if judgment be rendered and execution satisfied, the defendant, or defendants, may sue all who were stockholders at the time of dissolution, &c." Our Supreme Court, by holding that a suit against several stockholders was properly brought, has decided that the liability of stockholders under this section was not several only but joint. (*State Sav. As'n vs. Kellogg*, 52 Mo., 583.)

V. The plaintiffs were not compelled to institute suit for the benefit of all the creditors of the company in order to have a standing in court. The personal liability provisions of the law against stockholders was not enacted for their benefit, but for the benefit of the creditors; and the latter are very properly left, as in other cases, to a race of diligence in the recovery of their claims, even though the stockholders may be subjected to more suits in consequence thereof. Plaintiffs are not compelled to bring suit in equity. (*Norris vs. Johnson*, 34 Md., 485; *Weeks vs. Love*, N. Y. Ct. App., [April Term 1873]; *Middleton Bank vs. Magill*, 5 Conn., 28; *Adkins vs. Thornton*, 19 Ga., 325; *Bullard vs. Bell*, 1 Mason, [U. S. C. C.] 244; *Ang. Am. Corp.*, §§ 624, 625, 626; *Allen vs. Sewall*, 2 Wend., 327.)

VI. The amendment to section 6, of article 8, of the State Constitution, adopted at the general election in November, 1870, did not relieve the defendants from their liability for plaintiffs' debt, contracted before the adoption of that amendment. To hold that they were so relieved, would be to decide that a law might be passed impairing the obligation of a contract. (*Conant vs. Van Schaick*, 24 Barb., 87; *Hawthorne vs. Calef*, 2 Wall., 10; *Prov. Sav. Ins. vs. Jackson Place Sk. & B. Rink*, *supra*.)

VII. All of the defendants are, and each one of them is,

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liable for the entire debts of the company remaining unpaid at its dissolution. (Wagn. Stat., 293, § 22.)

Holland, Oliver & Stringfellow, and Ben Loan, for Respondents

I. Plaintiffs' remedy against the corporation should have been exhausted and shown ineffectual, before proceeding against private stockholders, (*McClaren vs. Franciscus*, 43 Mo., 452; Wagn. Stat., 293, § 22; R. C. 1855, p. 402, § 32.) For legislation of construction of § 32, of act 1855, see § 39 of same statute page 403. The act of 1855, being revised by the law of 1865, is to be construed as meaning just what is meant in 1855. In 1858 it did not mean double liability.

II. The creditor of a corporation which has dissolved cannot sue the stockholders alone. The suit must be brought for the benefit of all the stockholders. (*Crease vs. Babcock*, 10 Met., 525; 24 Ill., 47.) The constitution does not inforce itself. (39 Mo., 489; 15 Peters, 469.)

III. This action will not lie against defendants jointly. They are alleged to be stockholders in a defunct corporation, but they each own separate shares of stock, and for different amounts. An action at law will not lie under such circumstances. Different judgments must be rendered against each. A joint judgment could not be rendered.

IV. The stockholders are only liable for the unpaid balance due on their subscription and one hundred per cent. in addition thereto. This an entire liability.

NAPTON, Judge, delivered the opinion of the court.

As the only question in this case arises on the sufficiency of the petition, it will be necessary to state it in substance. The action is brought by *Perry & Brothers*, a partnership firm doing business under that name, against *Turner, Hays, Wasson* and others, alleged to be stockholders in the *St. Louis and St. Joseph railroad company*, to recover the amount of \$22,500, alleged to be due from that company to the plaintiffs.

It is alleged that in 1868 the company was duly organized

under the general law concerning private corporations, for the construction and operation of a certain railroad therein described; that the capital stock of the company was divided into shares of \$100 each; that said road was built and operated up to the date of the dissolution of the company herein-after stated.

The number of shares of stock which each defendant held is there stated, as also the fact that they continued to hold such shares up to the date of said dissolution; that none of the defendants had paid the debts sued for, or any part of them, nor have they or either of them ever paid into said company any amount over and above the amount of capital stock held by each.

The plaintiffs then proceed to set out at large the various items of indebtedness of the company to them growing out of work and labor done and materials furnished, and certain bills of exchange drawn on the company and accepted by them, but which the plaintiffs having indorsed had ultimately to pay, and also sundry settlements had with the company which left the company in debt to them in the sum of \$7,858.13, due on the 18th day of October, 1870; and for all these items or amounts, with interest, they ask judgment. The details of these claims are immaterial to the consideration of the questions to be decided. The plaintiffs further state that on the 20th of December, 1870, the company became and was wholly and completely insolvent and unable to pay its debts and liabilities; that on said day said company was declared bankrupt by a court of competent jurisdiction, and thereupon all its property, real, personal, etc., was assigned and transferred to an assignee appointed by the said court in bankruptcy; that from this time the company abandoned its business, and ceased to operate its road and has never since re-organized, etc. Whereupon the plaintiffs state that by reason of the facts above stated said company was dissolved on the day and year last aforesaid. Plaintiffs also state that by virtue of the statutes relative to corporations and by virtue of the provisions of the constitution and laws of the State of Missouri, the defendants became

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and are liable for the debts aforesaid; wherefore they demand judgment, that the said St. Louis and St. Joseph railroad company may be judicially declared and adjudged to have been dissolved on the 29th day of December, 1870, and that said defendants may be required to pay the plaintiffs the amounts of their several claims hereinbefore described and sued for, and that they may have such other and further relief, with their costs, as may be deemed just and proper.

After answers and replications had been filed, and the case came up for trial, the plaintiffs offered evidence to sustain the various allegations of the petition, which being objected to, the court sustained the objection. Whereupon the plaintiffs took a non-suit, with leave, etc.

This petition is obviously framed upon a misconstruction of the 22d section of the first article of our law concerning Private Corporations. The suit is brought against several stockholders to recover certain debts against the company, on the allegation of a dissolution of the corporation. The 22d section provides "that if any company formed under this act dissolve, leaving debts unpaid, suits may be brought against any person or persons who were stockholders at the time of such dissolution, without joining the company in such suit." And it is assumed that this language is broad enough to declare that the stockholder or stockholders sued, are liable for the amount of the indebtedness, without regard to the amount of stock he holds. In other words, upon a dissolution of a corporation, under the act, each stockholder is responsible for the debts of the corporation, as in case of partnership. A stockholder owning only one share, if a hundred dollars, is liable for a debt of the corporation which may be to fifty times the amount of his stock. Such a construction, however it might comport with the literal meaning of the terms of the act, would be rather startling to those who have embarked in such enterprises. The legislature had undoubtedly the power to make each stockholder responsible for all the debts of the company, the only limit to the power of the legislature under the constitution being that the responsibility should

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not be less than a sum equivalent to the amount of stock owned, but might be extended to the liability assumed in ordinary partnerships.

But the concluding part of this section seems to show very conclusively, that the legislature had no design to exact from a stockholder any amount over and above the amount of stock he held. For it provides that where such suits are brought against the stockholder, and a recovery is had and executions are satisfied, the stockholder thus sued and compelled to pay the judgment "may sue all who were stockholders at the time of the dissolution for the recovery of the portion of such debt for which he was liable, and the execution upon the judgment shall direct the collection to be made from property of each stockholder respectively: and if any number of stockholders (defendants in the case) shall not have property enough to satisfy his or their portion of the execution, then the amount of deficiency shall be divided equally amongst all the remaining stockholders, and collections made accordingly, deducting from the amount a sum in proportion to the amount of stock owned by the plaintiff at the time the company dissolved."

This section is manifestly a copy of the 32d section of the act of 1855 concerning Road Associations, under which only a single liability was attached to stockholders; and the legislature neglected to make the corresponding changes which the constitution of 1865 required. So that, under this 22d section as it stands copied from the law of 1855, the defendants are not liable at all under the allegations of the petition, which concede that they had fully paid up their respective shares of stock; for the 39th section of this law of 1855 declares in so many words "that a stockholder in any company formed under this act shall not be liable for more than the amount of his stock," and the 22d section of the act of 1865 is a simple repetition, word for word, of the 32d section of the act of 1855, above referred to.

But conceding that as the Constitution did not permit the legislature to diminish the liability of the stockholders below

that of the full amount of the stock subscribed, and whatever portions of the stock may have been unpaid, this 22d section must, therefore, be construed in accordance with this constitutional provision, and will be held to refer to what is called the "double liability," secured in the constitution, it remains to be considered whether the allegations of a dissolution of the corporation made in the petition are sufficient.

This point was sufficiently considered by this court in *State Savings Bank vs. Kellogg* (52 Mo., 583). In that case this court adopted the views of the New York courts in the construction of a similar provision of their corporation law, *Slee vs. Bloom*, (19 Johns., 456,) and *Briggs vs. Penniman*, (8 Cow., 387,) and held that a formal surrender or a judgment of dissolution at the instance of the State, was not necessary to authorize the creditors to sue the stockholders under this 22d section. The averments in that case were that the corporation was wholly insolvent and bankrupt, and was totally without funds or means, whereby it became dissolved, by reason of a total want of funds or means to exercise its corporate powers. In this case the allegation is that the St. Louis and St. Joseph railroad company became and was wholly and completely insolvent and unable to pay its debts and liabilities, and had been declared bankrupt in the United States District Court, and all its effects had been assigned and transferred to the assignee appointed by that court. This allegation is not so exact and complete as the allegations in the case of the *State Savings Bank vs. Kellogg*, but we suppose no allegations are necessary, except that the company was dissolved, and it is not necessary to state the facts upon which that allegation is based. They are matters of proof, and it is for the court on the trial, to declare whether a dissolution within the meaning of the law is established.

The responsibility of the stockholders is undoubtedly secondary and contingent, and the statute only relieves the creditors from pursuing the corporation in case of its dissolution. What facts will constitute such a dissolution is not necessary to be averred in the pleadings. (*Bank of Poughkeepsie vs. Ibbotson*, 24 Wend., 473.)

It is not easy to determine what the intention of the pleader was in this case, whether the proceeding was designed as a legal or equitable one. The theory upon which it is based is clearly wrong, and treating it as an action at law to recover from the defendants the various items of indebtedness enumerated in the petition, on the grounds of the joint and several liability of such stockholders for the entire debts of the corporation, it could not be sustained. And this seems to be the main scope and general purpose of the petition. Of course it would not matter what judgment or decree was asked if the facts stated authorized any.

But treating it as an action at law to recover the liability imposed by the constitution and the statute, it is equally defective, since there is no joint liability imposed in such cases. Each stockholder is responsible to creditors for the amount or double the amount of his stock, as the case may be, and a joint judgment could not be rendered. This is clearly established in the case of Ibbotson, above referred to, where the New York statute is substantially the same as ours. Justice Nelson says in that case: "There can be no doubt that the liability of the stockholders is several and not joint. The measure of it may be wholly different in each case, depending upon the shares held. A joint suit would be impracticable as there could be no joint judgment. Besides the act did not intend that they should be sureties for each other. Each is severally responsible to the amount of his own stock."

In *Norris vs. Johnson*, (34 Md., 485) no different doctrine is maintained. That was a suit against a single stockholder, and it was held, as it was in the case of Ibbotson, that such an action was maintainable at law, although there were other creditors besides the one suing. In neither case is it denied that a remedy in equity against all the stockholders might be pursued.

In Massachusetts the doctrine has been, that the creditor is confined to his remedy in equity, as it requires the party seeking to enforce the liability to join in the suit all the parties in interest who are to be affected by the decree, and thereby avoids a multiplicity of actions and apportionments among all the

stockholders contribution from each in proportion to his share of the general burden.

But in New York and Maryland they allow a creditor to bring his action at law against any stockholder, and so in this State I suppose the double liability can be enforced against any stockholder by an action at law, although an equitable suit might be maintained against them all to contribute the share of each in proportion to his stock to the debts sued on.

The case of *State Savings Bank vs. Kellogg* (52 Mo., 583), has been cited to show that a joint action at law may be maintained; but an examination of that case as reported does not establish any such doctrine. No such question was raised, or discussed, or decided, nor does the statement show that any such question could have arisen. The suit in that case may have been against all the stockholders and it may have been an equitable proceeding. It was certainly only to recover the amount due from each defendant proportioned by the amount of stock owned by him. Nothing more was claimed and no question of the misjoinder of parties defendant was made.

If the action is to be regarded as an equitable one, then the question arises, whether a single creditor can select a certain number of stockholders from whom to exact their respective liabilities without suing for all others who may be creditors, and against all the stockholders who may be liable, thus apportioning the responsibilities as the law ultimately designs them to be. This is the mode pursued in *Massachusetts* (*Harris vs. First Parish of Dorchester*, 23 Pick, 112; *Erickson vs. Nesmith*, 15 Gray, 221), and the only mode there tolerated. But our law, as in New York and Maryland, allows an action at law against any stockholder; the stockholder thus compelled to pay must resort to his remedy for contribution against other stockholders. But such a proceeding, whether at law or equity, is not upon a joint liability and can only reach the individual liability of each stockholder, and if brought against more than one stockholder must necessarily be a proceeding in equity.

It is intimated by the court in the case of *Kritzer vs. Woodson*, 19 Mo., 327, that the section of our statute which ren-

ders the stockholders individually liable for the debts of the corporation to double the amount of their stock, is a highly penal provision, and is, therefore, to be strictly construed, and the mode of enforcing it pointed out by the statute strictly pursued. In the other States, this liability, whether it is such as arises under the 13th section or the 22d section; as they are in our law, seems to be regarded as arising from contract, and therefore protected from being impaired by subsequent legislation. (*Corning vs. McCullough*, 1 N. Y., 47; *Norris vs. Wrenshall*, 34 Md., 492.) And the case of *Hawthorn vs. Calef*, 2 Wal., 10 proceeds on this theory. Whether these decisions are applicable to the facts of this case it is not necessary now to determine. The constitution, at the same time that this double liability was provided for, in a previous section of the same article, declares that corporations may be formed under general laws, but shall not be created under special acts except for municipal purposes, and all general laws and special acts passed pursuant to this section may be altered, amended or repealed; and the 5th section of the 4th article of the act concerning Laws (2 Wagn. Stat., 875) provides that "the repeal of any statutory provision shall not affect any act done or right accrued or established in any proceeding, suit or prosecution had and commenced in any civil case previous to the time when such repeal shall take effect; but every such act, right and proceeding shall remain as valid and effectual as if the provisions so repealed had remained in force."

How far the existence of these contemporaneous provisions of the constitution and statute would affect the liability in this case under the decision of *Hawthorne vs. Calef*, and other decisions of this court following that case, may be a question worth considering. But I will not be understood as expressing any opinion, either for myself or my brother judges, on this point. It is clear that the statutes designed to carry out this 6th section of the 8th article, now repealed since November, 1870, may limit the enforcement of such liability as to time.

I think the judgment must be affirmed. Judge Vories did not sit. The other judges concur.

Hannan v. Shotwell, et al.

VALENTINE HANNAN, Respondent, *vs.* WILLIAM H. SHOTWELL
AND JOHN W. SHOTWELL, Appellants.

1. *Practice, civil—Costs, taxation of—Recovery of amount below jurisdiction of court.*—The action of a lower court in overruling a motion to tax the costs against the plaintiff in a case on contract, wherein plaintiff recovered an amount below the jurisdiction of the court, is evidence that the court considered, that the plaintiff had reasonable ground to believe at the time of the commencement of the suit, that he was justly entitled to recover judgment for an amount within the jurisdiction of the court. (Wagn. Stat., 343, § 12.)

Appeal from Ray Common Pleas.

Doniphan, Garner & Dunn, for Appellants.

Black & Black, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

This was a suit founded on a contract, and the balance claimed to be due was \$420. The plaintiff had a verdict for \$5.00, and the defendants thereupon moved the court to tax the costs against the plaintiff, on the ground that the amount of the recovery was below the jurisdiction of the court. This motion was overruled.

Ordinarily under the provisions of the statute, if the plaintiff in an action on contract recovers an amount, which, exclusive of interest, and aside from reduction by set-off, is below the jurisdiction of the court, the costs are to be adjudged against him. This is not the case however, if the court is of opinion from the evidence that the plaintiff, when he brought his suit, had reasonable ground for believing himself entitled to a recovery within the jurisdiction of the court. That the court entertained such opinion is evident from its action on the motion. The matter of re-taxing costs in cases of this sort, the law has wisely confided to the court which is conversant with the cause in all its details, and is therefore capable of forming a more correct opinion on the subject than the appellate court. (Johnson vs. Devlin, 31 Mo., 427.)

Judgment affirmed.

State v. Whitsell, et al.

THE STATE OF MISSOURI, Defendant in Error, *vs.* A. M. WHITSELL, H. WHITTINGTON AND WM. HARSELL Plaintiffs in Error.

1. *Practice, civil—Scire facias—Continuance of cause—May be set aside, when.*—Where suit on a recognizance is continued to the next term, and defendant is informed that he may depart in conformity thereto, it is manifest error to set aside the continuance and try the case at the same term; and an answer in such case setting up the continuance and attendant circumstances is a good defense.

While a court has the undoubted right to set aside an order continuing a cause, yet this never should be done in a manner to operate as a surprise upon the other party; and never without the existence of the most urgent reasons for vacating such order.

Error to Clinton Circuit Court.

Ingles & Ramey, for Plaintiffs in Error.

T. A. Young, for Defendant in Error.

SHERWOOD, Judge, delivered the opinion of the court.

A. M. Whitsell was indicted for selling liquor without license, and upon being arrested, entered into recognizance with Whittington and Harsell as sureties for his appearance at the April Term, 1871. At that term on the application of Whitsell, the cause was continued until the next term, and the defendant was informed by the court that he might depart in conformity to such continuance. At the same term however, at which the cause was continued and at a subsequent day thereof, without any notice to the defendant, and without setting aside the continuance granted, the cause was called for trial and defendant not appearing, a forfeiture was taken against him and his sureties, and a *scire facias* ordered to issue.

At that term to which that writ was made returnable, judgment by default was rendered against defendants, which was virtually set aside by defendants being permitted to file an answer alleging the continuance of the cause and the attendant circumstances as heretofore stated, as a defense to the allegations of the writ.

The court, on the ground that nothing in bar of the action

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was alleged in the answer, treated it as a nullity, and rendered judgment as though no answer had been filed, and in this it clearly erred, as the matter set up in the answer unquestionably showed that no breach of the conditions of the recognizance had occurred. While a court has the undoubted right to set aside an order continuing a cause, yet this should never be done in a manner to operate as a surprise upon the party who has been permitted to depart, and never without the existence of the most cogent reasons for vacating such order.

Judgment reversed and cause remanded, Judge Vories did not sit; the other judges concur.

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VINCENT BRUCE AND CORINTHA BRUCE, Respondents, vs. WILLIAM H. LEARY, *et al.*, Appellants.

1. *Execution sale, in session of County and not of Circuit Court void.*—An execution sale of land otherwise regular, but made during a session of the County Court, and not shown to be made during a term of the Circuit Court, and a deed made under such sale, would be absolutely void, both in direct and collateral proceeding.

Appeal from Linn Circuit Court.

Mullins & Boardman, for Appellants, cited in argument *Merchants Bank vs. Evans*, 51 Mo., 335; *McClurg vs. Dollarhide*, 51 Mo., 347.

G. W. Easley and G. D. Burgess, for Respondents.

VORIES, Judge, delivered the opinion of the court.

This was an action of ejectment brought by the plaintiffs against the defendant in the Linn Circuit Court, to recover the West half of Section thirty-six, in Township fifty-eight, of Range 21, in Linn County, Missouri. The petition is in the usual form. After the service of the summons, by the permission of the court, the children and heirs of the deceased wife of the defendant (who it was claimed, was the owner of

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part of the land at her death), and who were also the children of the defendant, were also made parties defendant to the action.

The defendants after this filed a joint answer to the plaintiffs' petition. In their answer they deny that the plaintiffs at the time named in their petition, or at any time, were entitled to the possession of the premises described in the petition or any part thereof; they deny that at any time, they, or either, or any of them, entered into the possession of said premises or any part thereof, except the east half of the south-west quarter of the section named in the petition; deny that they, or either of them have ever withheld any other part of said land from the plaintiff. They aver, that their possession of said east half of said south-west quarter of said section, was lawful and not in violation of the rights of plaintiffs; but that said portion of said land belonged to defendants. The defendants also set up the statute of limitations as a defense to the plaintiffs' action, so far as said east half of said quarter-section of land was concerned. There is no controversy in the case in regard to any part of the land named in the petition, except as to the 80 acres claimed by defendant; no evidence being introduced, tending to prove that the defendants, or any of them, had ever been in the possession of any other part of the land. The plaintiffs, on the trial, in order to maintain the issues on their part, introduced in evidence a deed executed by the United States Marshal of the Western District of the State of Missouri, which purported to convey (among other lands) the land in controversy as the lands of William H. Leary to William H. Brownlee.

The deed recited that at the October term of the United States Circuit Court, within and for the District of Missouri, in the year 1860, William H. DeGraw recovered a judgment against William H. Leary and Thomas Hancock for the sum, &c.; that on the 15th day of October, 1860, an execution issued on said judgment, which was delivered to said marshal and was levied by him on the land in controversy, and that after said land had been advertised for 20 days as the law di-

rects, said marshal did on the 4th day of February, 1861, before the door of the Court House in Linn County, offer said land for sale at auction to the highest bidder, while the County Court of said county was in session, &c; and that, at said sale, said Greenlee became the purchaser of said land, &c. The deed proceeded to convey said land to said Greenlee in the ordinary form. In fact, there is no objection to the form of the deed, if it was lawful for the marshal to sell the land at a session of the County Court, in place of selling the same during a term of the Circuit Court of said county.

The defendants objected to the reading of the deed in evidence, because it was shown on the face of the deed that the land described therein was not sold by the marshal while the Circuit Court was in session, but was sold by the marshal while the County Court was in session.

This objection was overruled by the court, and said deed read in evidence; to which reading defendants excepted. The plaintiffs then read in evidence a deed from said Greenlee, conveying or purporting to convey the land in controversy to the female plaintiff who is the wife of her co-plaintiff. This deed is in the usual form, and said deeds constitute all of the evidence offered by the plaintiffs, tending to show their right or title to the land in controversy.

The defendants then offered some evidence on their part, which, from the view that we have taken of the case, need not be stated.

At the close of the evidence, the court, at the request of the plaintiffs, among other instructions gave the jury the following:

"If the jury believe from the evidence that William H. Leary was in possession of the E. 1-2, S-W. 1-4, 36, 58, 21, on and prior to the 4th day of October, 1860, and remained in possession of the same till the time of the commencement of this suit (Aug. 30, 1869), then the deed from the U. S. Marshal to W. H. Brownlee and the deed from W. H. Brownlee to Corintha Bruce conveys to Mrs. Bruce whatever interest the said W. H. Leary had in said land, and the said W. H. Leary cannot show an outstanding title in the other defend-

ants to defeat the plaintiffs recovery in this action, and the jury should find for plaintiffs."

This instruction was objected to by the defendants, but their objections were overruled and they excepted. There were other instructions given and refused by the court, but which cannot effect the merits of the case, and will not be noticed in this opinion.

The jury found for the plaintiffs; the defendants filed their several motions for a new trial and in arrest of judgment, which being severally overruled by the court, and final judgment rendered in favor of plaintiffs for the recovery of the land, the defendants have appealed to this court.

The only question which it is necessary to examine in this case, is as to the effect of the deed of the Marshal of the United States, purporting to convey the land in controversy to Greenlee; for if Greenlee received no title by virtue of said deed he could convey none to the plaintiffs, and if the plaintiffs had no title they cannot recover. It was not necessary for the defendants, if the plaintiffs had no title, to show a title, either in themselves or in a stranger. It appears on the face of the deed executed by the marshal to Greenlee; that the sale of the land made by the marshal was made at the Court House door of Linn County, during the session of the County Court, and the question is, did this deed have the effect to confer any title on Greenlee? If not, the plaintiffs cannot recover. This very question was before this court in the case of *Merchants' Bank vs. Evans*, 51 Mo., 335. In that case, after a full review of all the law and authorities on the subject, it was held that a sale of land, otherwise regular, but made during the session of the County Court by the marshal under an execution, and not shown to be during a term of the Circuit Court, and a deed made under such sale would be absolutely void, and would be held so, not only in a direct proceeding, but also in a collateral way. That decision disposes of this case.

It was erroneous in the court below to admit the marshal's deed in evidence, and the instruction given by the court, telling the jury, that the deed had the effect of conveying to Greenlee whatever title Leary had in the land, was also erroneous.

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There were other questions raised by the parties in this case; but as the question already considered finally disposes of the case, it is not necessary to pass upon any other question.

The judgment must be reversed and the cause remanded. The other judges concur.

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WESLEY HALLIBURTON, Appellant, vs. CALVIN T. CARTER,
Respondent.

1. *Guardian—Defalcation by—Liable after discharge in bankruptcy for money paid by surety, when.*—Where a guardian makes default, and his surety is forced to pay the deficit, the principal remains liable to his surety, notwithstanding the discharge of the former in bankruptcy, for the full amount paid on his behalf. (Nat. Bkpty. Act, §§ 19, 32, 33, 35.)
2. *Surety—Money paid by, for principal—Recoverable how—Implied promise.*—The law is well settled that where a surety pays the debt of his principal, an implied promise on the part of the latter arises to refund the money, and the money may be recovered in an action at law.

Appeal from Linn Circuit Court.

Geo. W. Easley, for Respondent.

I. While it has seldom been decided under the Act of 1867, it has been repeatedly held, under the Act of 1841, that a discharge is a bar to any claim by a surety for money which he has been compelled to pay for the bankrupt, after his discharge, on a contract made prior to his bankruptcy. (Mace vs. Wells, 7 How., 272; Crafts vs. Mott, 4 N. Y., 603; Butcher vs. Forman, 6 Hill, 583; Morse vs. Hovey, 1 Sandf. Ch., 187; Fulwood vs. Bushfield, 14 Penn. St., 90; Cake vs. Lewis, 8 Penn. St., 493; Mullin vs. Penn. Township Bank, 2 Penn. St., 343; Hardy vs. Carter, 8 Humph., 153.) There is no fiduciary relation here, between principal and surety. The contract of the guardian to his ward is, that he will discharge his duties according to law—the contract of the surety is—that if guardian does not do

so, he will pay the damages. The contract between the parties to the action, ought to determine whether they are acting in a fiduciary character or not, and this contract does not place the parties in any confidential relation. (Jones vs. Knox, 46 Ala., 53.)

II. Nor can the doctrine of subrogation be invoked for the purpose of holding, that if the debt is not discharged as against the ward, it is not against the surety. The right of subrogation, is only the right to be substituted to all the rights of the creditor which are collateral to the main contract; that is, if the creditor has any security for his debt, or any preference in time or amount is given him, or he has a lien on any specific fund or property, or his debt is a bonded one, when there is a distinction between specialities and simple contracts, the surety on payment becomes substituted to that right. (1 Sto. Eq., §§ 499b, 499c; Pierson vs. Catlin, 18 Vt., 77; Allen vs. Ogden, 12 Vt., 9; Miller vs. Woodward, 8 Mo., 169; Crump vs. McMurtry, 8 Mo., 408; Smith vs. Schneider, 23 Mo., 447.)

G. D. Burgess, for Appellant.

I. A discharge in bankruptcy does not relieve a guardian from his fiduciary obligations as such, and if his surety discharges them and obtains a judgment therefor, he may levy upon the property of the bankrupt, acquired after his discharge. (Carlin vs. Carlin, 8 Bush., 141.)

In the present case the surety is entitled to all the rights and equities of the ward of Carter, and if Carter could not be discharged as against his ward, he could not as against his surety.

ADAMS, Judge, delivered the opinion of the court.

On the 5th day of July, 1862, Collin T. Carter was duly appointed guardian of the person and curator of the estate of William W. C. Moore, a minor, and on the same day executed his bond, with the plaintiff and others as his sureties. He made his last annual statement or report of the estate of his

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ward, on the 8th day of January, 1861, shortly after which time, he became non-resident, and was for that reason removed from the guardianship and curatorship of said ward on the 7th day of January, 1867, by the Probate Court of Linn county, and another curator was appointed for the said minor. Carter never made any report of the condition of his trust, after the 8th day of January, 1861, and never accounted for the balance of \$3,411.87, then shown to be in his hands belonging to his ward.

On the 26th day of January, 1867, suit was brought on the bond of Carter, and Halliburton was served with summons therein, on the 6th day of February, 1867, and judgment was rendered against Halliburton and Sandusky therein, on the 15th day of June, 1869, which was afterwards modified by this court (See State, &c., *ex rel.* Moore by guardian vs. Sandusky, 46 Mo., 377); and judgment rendered against two of the sureties for \$4000, which the said Halliburton fully discharged on the 20th day of December, 1870.

On the 29th day of February, 1868, the defendant Carter, was on his own petition adjudged a bankrupt by the District Court of the United States, for the Western District of Missouri, and a discharge in bankruptcy was granted to him on the 8th day of December, 1868. The appellant now seeks in this action to recover from the defendant the money so paid by him on said judgment, and the respondent interposes his discharge in bankruptcy as a defense, and the only question presented by this record is, whether the respondent is protected by said discharge in bankruptcy from the payment of said demand. This question was raised by the evidence, and instructions given and refused, and was decided by the Circuit Court in favor of the defendant. It is manifest from this statement that the solution of the point in dispute, depends upon the proper construction to be given to the bankrupt's discharge under the Act of Congress of 1867.

Section 32 of that act declares, that the court shall grant him a discharge from all his debts, except as therein afterwards provided. This section also prescribes the form of a

certificate of discharge which contains the exception in this language, "excepting such debts, if any as are by said act excepted from the operation of a discharge in bankruptcy."

By section 33 it is provided "that no debt created by fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged under this act, but the debt may be proved, and the dividend thereon shall be a payment on said debt, and no discharge granted under this act shall release, discharge or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety or otherwise."

Section 35 provides "that a discharge duly granted under this act shall, with the exceptions aforesaid, release the bankrupt from all debts, claims, liabilities and demands which were, or might have been proved against his estate in bankruptcy, and may be pleaded by a simple averment, that on the day of its date such discharge was granted to him, setting the same forth in *haec verba* as a full and complete bar to all suits brought on any such debts, claims, liabilities or demands, and the certificate shall be conclusive evidence in favor of such bankrupt of the fact and the regularity of such discharge."

By section 19 of the same act it is provided that any person liable as surety, &c., for the bankrupt, who has paid the debt or any part thereof in discharge of the whole, shall be entitled to prove the debt or stand in the place of the creditor if he shall have proved the same, &c.; and any person so liable as surety, may if the creditor shall fail or omit to prove the debt, prove the same either in the name of the creditor or otherwise as may be provided by the rules, &c. These are all the provisions of the bankrupt law bearing on the question under consideration.

The defalcation of the defendant on his bond as guardian, beyond all controversy constituted a debt which was created while he was acting in his fiduciary character; it was therefore excepted from the operations of his discharge in bankruptcy, and continued against him after his discharge in full force,

and with all of its incidents as before, and the plaintiff stood as his surety, after the discharge, precisely as he had done before the proceedings in bankruptcy. Their obligations towards each other and in regard to the ward remained the same; one was the principal, and the other the surety, for the same debt or defalcation. The law is well settled that where a surety pays the debt of a principal, an implied promise on the part of the latter arises to refund the money. It is considered as money paid and expended for the use of the principal by the surety, and may be recovered by him as such in an action at law. The point is made here, that although the debt or defalcation in favor of the ward was not discharged, yet the contingent liability of the principal to his surety was released on the ground, that such liability is not of a fiduciary character. The statute in my judgment will not bear this construction. Where the principal is released from a debt by his discharge in bankruptcy, he would also be released from his contingent liability to his surety for the same debt; but when the debt itself remains unaffected by the discharge, there can be no reason why the surety for the same debt should not retain all his rights against the principal. (*Carlin vs. Carlin*, 8 Bush., 141.) The case of *Jones vs. Knox*, (46 Ala., 53,) relied on by counsel for defendant, is not in conflict with the doctrines here contained. That case was a suit against a surety on a guardian's bond, in which the court held that the surety does not occupy a fiduciary relation towards the ward of his principal, and that a discharge of the surety in bankruptcy, discharges his contingent liability as surety on the guardian's bond.

Let the judgment be reversed, and the cause remanded. All the judges concur.

STATE OF MISSOURI, Respondent, *vs.* BARTHOLOMEW O'ROURKE,
Appellant.

1. *Practice, criminal—Venue, change of—Discretionary with court to grant when—Amended statute touching.*—Where the prisoner applied for change of venue on the ground of prejudice in the judge and the application was made properly and in time, under § 19, (p. 1097, Wagn. Stat.,) it was imperative on the court to grant the application. But under the act of 1873, amending § 19 (Sess. Acts 1873, pp. 56–7,) it was left discretionary with the court either to grant or refuse the prayer.

Section 19, and its amendment apply equally to all petitions for change of venue as well when made for causes set forth in § 15, as in subsequent ones of the statutes. (Wagn. Stat., p. 1097.)

Appeal from Andrew Circuit Court.

Harlan & Strongs, and Hedenburg, for Appellant

I. Under a proper construction of the act of 1873 (Sess. Acts, 1873, p. 56), appellant was not bound to prove anything to the court below. It is sufficient if it appears by the record that the court is prejudiced against the defendant. It is unreasonable to suppose that the legislature intended to provide that the issues should be made and tried, before and by the judge of the court, upon the evidence pro. and con., the issue being made on a charge of prejudice of the judge against a party whose right to life or liberty is at stake and on trial before him. This is an issue between the judge and the appellant. Can anything be more monstrous than the proposition that one of the parties to this issue shall sit to try and determine it in his own favor?

George T. Bryan for Respondent.

I. Section 19, of the General Statute of this State, as amended in 1873, requires the truth of the allegations in an application for a change of venue to be proved to the satisfaction of the court, by legal and competent evidence, and in this case there was no evidence given or offered by the defendant in support of the affidavit.

James P. Thomas, for Respondent.

I. The statute nowhere authorizes an application by a defendant for a change of venue on the ground of the judge's prejudice. Sections 19, p. 1097, and 41, p. 1100, Wagn. Stat., are by the statute restricted to cases arising under §§ 16, 17, 18 and 23 of the statute. (*Porter vs. State*, 5 Mo., 538.)

II. If section 15, Wagn. Stat., 1097, is controlled by section 19, then the truth of the allegation in appellant's petition for a change of venue, must be proved to the satisfaction of the court by legal and competent evidence. (*Sess. Acts 1873*, p. 56.)

VORLES, Judge, delivered the opinion of the court.

This was a prosecution against the defendant upon an indictment for robbery which included a charge of grand larceny. No objection was made to the sufficiency of the indictment. The indictment was found at the April Term of the Andrew Circuit Court, in the year 1873. At the August Term of said court in the year 1873, the defendant was arraigned and pleaded not guilty to the indictment. No other notice of the defendant or the cause appears on the record at said term. It appears from the docket entries and bill of exceptions filed in the case, that at the December Term of the court which commenced on the second day of said month, the defendant again appeared in court; that on the first and second days of said term, said cause was informally passed on the docket for the reason that the defendant's witnesses were not all present; that on the fourth day of said term the cause was again called for trial, and the defendant not yet being ready for trial, the cause was by the agreement of the parties, and at the request of the defendant continued until the second Thursday of the term, which was the eleventh day of December, 1873, to enable the defendant to get his witnesses and prepare for trial; that afterwards, on the 9th day of December, the defendant filed his motion for a change of venue in said cause, with the acceptance or waiver of notice by the prosecuting attorney indorsed thereon, which motion and waiver of notice are as follows:

"State of Missouri, Plaintiff, against Bartholomew O'Rourke, Defendant." "In the Circuit Court of Andrew county, comes now the defendant, and moves the court to grant him a change of venue in this case to the Circuit Court of some other county and circuit; and for reason of such petition, this defendant avers and charges that the judge of this court is prejudiced against said defendant." Witness, W. Caldwell, "Bartholomew O'Rourke," [his X mark.]

"State of Missouri, County of Andrew." "Bartholomew O'Rourke, being duly sworn on his oath states, that he is the defendant in the above entitled cause; that he has subscribed the foregoing application for a change of venue in said cause. And this affiant states that the allegations in said application, that the judge of this court is prejudiced against him are true, wherefore defendant asks for a change of venue as above prayed." This affidavit is subscribed and sworn to in the usual form. There is also indorsed on the said application the following: "I accept notice of this application and waive, further notice. December 9th, 1873, G. T. Bryan, Prosecuting Attorney."

The application was also indorsed by the clerk of the court, that it was filed the 9th of December, 1873.

It appears that without any further notice having been taken of the application for a change of venue, the case was again called for trial on the 11th day of December, (the day before set for the trial of the case) when the Circuit Attorney announced that the State was ready for trial. The attorney for the defendant, then called the attention of the court to the application before filed by the defendant, for a change of the venue of the cause. The bill of exceptions shows that this was the first notice that the court had of the existence or nature of the application, the same having been filed without calling the attention of the court to its character or object, or to the waiver of notice on the part of the Circuit Attorney, whereupon the court believing that the application was unfounded and vexatious overruled the same and directed the defendant to answer whether he was ready for trial." The defendant refused

to answer and duly excepted to the action of the court in overruling his application for a change of venue. The defendant still objected to the court proceeding with the trial, insisting that it had no further jurisdiction over the matter. The court ordered the trial to proceed and a jury was impaneled in the usual way, before whom the case was tried and a verdict returned by the jury, finding the defendant guilty of grand larceny, and assessing his punishment to imprisonment in the penitentiary for the term of two years.

The defendant filed a motion for a new trial, setting out the usual causes stated in such motions, as well as the rulings of the court excepted to. The court overruled the motion and rendered a final judgment on the verdict. The defendant excepted and appealed to this court.

The only question presented for the consideration of this court or insisted on by the attorneys for the defendant, grows out of the action of the Circuit Court in overruling the defendant's application for a change of venue. No objection appears to have been made or exception taken to the giving or refusing instructions, and the exceptions taken to the action of the court in excluding evidence offered on the trial, are not insisted on here. It is insisted by the defendant in this court, that his application for a change of venue was in strict compliance with the 19th section of the 5th article of the act concerning "Practice in Criminal Cases" (Wagn. Stat., 1097), and that the court had no discretion in such cases; but that it was imperative on the court, when the petition or motion was filed, setting out the fact that the judge of the court was prejudiced in the cause, properly verified by the affidavits of the defendant, to change the venue in the cause, and that he had no further power or jurisdiction to try the case. It is not controverted by the attorney for the State, that the 19th section of the statute above referred to might be construed as is contended for by the defendant, where the application was made properly and in time under said section, prior to the passage of the amendment to said section by the Legislature in 1873. But it is insisted, that the act of 1873 entirely

changed the provisions of the 19th section, and that the application for a change of venue made by the defendants must be governed by the act of 1873; and that said application wholly failing to comply with the provisions of the last named act, was properly overruled by the court.

In order to a full understanding of the point involved in the case, it will be necessary to refer to the different provisions of the statute on the subject. By the 15th section of the statute first referred to (Wagn. Stat., 1097), it is provided as follows: "Where any indictment or criminal prosecution shall be pending in any Circuit Court, the same shall be removed by the order of such court or the judge thereof to the Circuit Court of some county in a different circuit, in either of the following cases: *First*, when the judge of the court in which said case is pending is near of kin to the defendant by blood or marriage; or *second*, when the offense charged is alleged to have been committed against the person or property of such judge, or some person near of kin to him; or *third*, when the judge is in any wise interested or prejudiced, or shall have been counsel in the case."

The 16th section provides for a change of venue when the inhabitants of the county where the prosecution is pending are prejudiced against the defendant.

The 17th section provides for cases where the inhabitants of the entire circuit are prejudiced against the defendant.

The 18th section designates the parties or persons who may make an application for a change of venue, in cases arising under the sixteenth and seventeenth sections.

The 19th section is as follows: "The petition of the applicant for a change of venue, shall set forth the facts, and the truth of the allegations shall be supported by the affidavit of the defendant or some credible disinterested person; and reasonable previous notice of such application must be given to the prosecuting attorney." This last section is equally applicable to all applications for a change of venue, whether made for causes set forth in either the fifteenth, sixteenth or seventeenth sections, and whether made by the defendant himself

or any of the other persons designated in the eighteenth section. And if the nineteenth section had still been in force without amendment, I have no doubt but the application made in this case ought to have been sustained. The court under that law had no discretion in the matter when the law was complied with. The reasons given in the bill of exceptions, that the court had not examined the application, and that the waiver of notice had not been pointed out to the court could avail nothing. It was the duty of the court to have examined it, and if it had complied with the law, to make the order changing the venue of the cause. (*Freleigh vs. The State*, 8 Mo., 606.)

The only real question in this case, is, whether the act of 1873, which purports to amend section 19 above referred to, is applicable to or governs this case. If it does, then the application for a change of venue was properly overruled.

The act of 1873 is as follows:

"**SECTION 1.** Section Nineteen of Chapter Two Hundred and Twelve of the General Statutes is hereby amended so as to read as follows: 'Sec. 19. The petition of the applicant for a change of venue, shall set forth the grounds upon which such change of venue may be sought, and the truth of the allegations thereof shall be proved to the satisfaction of the court by legal and competent evidence; and the prosecuting attorney may in such case, offer evidence in rebuttal of that submitted in support of such application: *Provided*, however, that reasonable previous notice of such application shall in all cases be given to the prosecuting attorney.' " (Laws of 1873, page 56.)

This act was approved on the 19th day of March, 1873, and took effect from its passage.

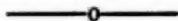
It will be seen that this amended section nineteen materially changes the manner of obtaining a change of venue in criminal cases. It is now required that the truth of the allegations set forth in the application, as the grounds upon which the change of venue is sought, shall be proved to the satisfaction of the court by legal and competent evidence. This certainly has the effect to submit that which was imperative on

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the court before the amendment to the discretion of the court, so that under this amended section, the question as to whether the motion for the change of venue shall be allowed or refused is now submitted under the evidence to the sound discretion of the court. If the judge's mind is satisfied from the evidence, that the facts relied on are true, he should change the venue; otherwise not.

There seems to have been no evidence offered to sustain the petition in this case, but the defendant wholly relied on the fact that the application was verified by his affidavit, as was required by section nineteen before it was amended in 1873. We think that the act of 1873 governs the case, and whether its requirements be reasonable or unreasonable, it must have the effect to submit the whole question to the discretion of the court, and as no evidence was offered to sustain the application, we cannot say that the discretion of the court was improperly exercised.

The judgment will be affirmed. The other judges concur.



**ALEXANDER BOWLING, et al., Respondents, vs. JOHN P. HAX
AND HENRY KRUG, Appellants.**

1. *Practice, civil—Filing of contracts signed by both parties not required when—Const. Stat.*—The statute which provides for the filing of the contract sued on with the petition (Wagn. Stat., 1022, § 51), has no application to a contract signed by both parties. (Campbell vs. Wolf, 33 Mo., 459.)
2. *Contract—Suit upon—Proof of subscribing witness.*—Under the present law permitting parties to testify, it is unnecessary, where suit is brought on a contract, to call a subscribing witness to prove the instrument. This proof may be made by the party himself.
3. *Practice, civil—Instruction—Error—Surplusage, etc.*—Where the objectionable part of an instruction is merely superfluous, and calculated to mislead no one, the granting of it is no ground for reversal.
4. *Practice, civil—Instruction—Question of fact for jury.*—The giving of an instruction which calls upon the court to pass upon a question of fact, is manifest error.

Appeal from Buchanan Circuit Court.

The third instruction given on behalf of plaintiff was as follows: "If the jury believe from the evidence, that defendants owe plaintiffs for corn, or cash paid for freight on cars, or pigs feet, or shrinkage on hogs, they will allow on said third count of plaintiffs' petition such amount therefor, as the evidence satisfies them that the plaintiffs are entitled to."

The third instruction asked by defendant, and refused by the court, was as follows: "There is no legal evidence before the jury, that said paper was executed by said parties."

Ben Loan, for Appellants.

I. The statute which directs the filing of the contract, is peremptory. (Wagn. Stat., 1022, § 51; *Id.*, 1046, § 45.)

II. The court erred in admitting the evidence of one of the plaintiffs, to prove the execution of the instrument sued on; it appearing on the face of the paper, that it was attested by a subscribing witness. (2 Phil. Ev. [6 Am. Ed.], 201-2; 1 Greenl. Ev. [9 Ed.], 754, 756, n. 5; *Neal vs. McKinstry*, 7 Mo., 128.)

III. The first instruction for plaintiffs, tells the jury to find for plaintiffs, if they find "that plaintiffs complied with all of said terms of said contract," without instructing them as to what acts would constitute a performance of said contract on the part of the plaintiffs. This was error.

A. H. Vories, for Respondents.

I. The old rule requiring the subscribing witness to a contract to be produced, resulted from the fact that parties were not admitted as witnesses. But now parties to the contract being witnesses, the reason for the law has ceased.

NAPTON, Judge, delivered the opinion of the court.

The only questions of law in this case, arise on the failure of the plaintiffs to file the original contract on which the suit was brought with the petition, and on the proof of the contract when the trial was had. There are other questions arising on the instructions which however chiefly bring up the same question.

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This action was upon a contract executed or alleged to be executed, by both plaintiffs and defendants. The petition excuses the failure to file the original contract, on the ground, that it was not in possession of the plaintiffs, but a copy of it is filed. The contract, it seems, was deposited with a third person. Sec. 51, of our Practice Act (Wagn. Stat., 1022), provides, that, when any petition or other pleading, shall be founded upon any instrument of writing charged to have been executed by the other party, or his testator or intestate, or other person represented by such party, and not therein alleged to be lost or destroyed, the same shall be filed with such petition or other pleading. The provision of our statute which provides for the filing of the contract sued on, with the petition, applies only to such obligations as are executed only by the party sued, in which cases either the obligation sued on must be filed, or there must be an allegation of loss or destruction of the instrument. In the present case the contract is signed by both parties, plaintiffs and defendants, and is deposited with a third person for safe keeping. The statute does not apply to such a case, and so it was held in *Campbell vs. Wolf*, (33 Mo., 459).

The principal objection in this case is to the proof of the contract, when it was offered in evidence. The custodian of the contract produced, stated that it had been handed to him as the contract by the parties to it, and one of the plaintiffs was called to prove its execution. It was objected, that as there was a subscribing witness, it was necessary to call him or give some excuse for his absence, and that secondary evidence could not be allowed to prove the execution of the contract. This was formerly unquestionably the law; but since parties have been made competent witnesses it is hard to see how it could be necessary to call a subscribing witness. No subscribing witness could know better than the parties themselves, as to the execution of the contract. The object of requiring a subscribing witness, was to secure the best evidence that was attainable; but the parties to the contract are surely as competent to state the facts, as any subscribing witness. The rule was establish-

ed when parties were not competent witnesses. Even under this rule the acknowledgment or admission of the parties to the execution of instruments not under seal was held sufficient. (*Hall vs. Phelps*, 2 Johns. Ch., 451; *Henry vs. Bishop*, 2 Wend., 575.)

The court gave seven instructions for the plaintiffs, and eight for the defendants, out of the eleven asked. No objections were made to any of the instructions for plaintiffs, except the first and third, and the only objection to the first instruction is, that it left to the jury a question of law. That instruction was as follows: "If the jury believe from the evidence, that plaintiffs and defendants, entered into the contract set out in said petition, and that plaintiffs under said contract, furnished defendants with 2816 hogs, or any other number of hogs, for slaughtering under said contract, and that defendants released plaintiffs from furnishing any more hogs than said number of 2816, and that plaintiffs complied with all of the said terms of said contract, etc." It is this last clause that is objected to, and it is unnecessary to recite the remainder of the instruction. An examination of the contract sued on, will show that really the plaintiffs had nothing more to do than to furnish a certain number of hogs, and the exact number required not having been furnished, the instruction required the jury to be satisfied that in this respect, the defendants had waived or dispensed with this part of plaintiffs' obligation. The objectionable part of the instruction was merely superfluous, a mere generality frequently used in such instructions, out of abundant caution, and calculated to mislead no one.

The contract sued on, is as follows: "This agreement is made between Hax & Krug, of St. Joseph, and A. Bowling and E. Holman, of Hannibal, Missouri, for the purposes and conditions as herein set forth, to-wit: Messrs. Hax & Krug, agree to slaughter and pack, three thousand hogs, and two thousand more on the same terms, should Messrs. Holman & Bowling, furnish the extra two thousand hogs. The killing and putting on the slides to be done for the offal resulting therefrom. For cutting, curing and rendering lard, twenty

cents per hundred pounds, hook or slide weights; and for rendering heads separate, one cent per pound. All offals resulting from the cutting of the hogs, shall be sold free of charge, and proceeds to be credited to Messrs. Bowling & H., or should they wish to do the selling, they have the same privilege. For making sugar cured hams, one cent per pound, and all the meat to be in such style as Messrs. B. & H., may order. Cooperage and salt, and other materials needed, to be furnished at actual cost, and smoking to be done at 20c per 100," &c. &c., signed by Bowling & Holman, and Hax & Krug.

It is apparent that the plaintiffs had nothing to do under this contract but to furnish the hogs, and the whole controversy had regard only to alleged delinquencies of the defendants, and there was no dispute as to any failure on the part of plaintiffs. No such failure was alleged or set up in the defense, nor was any evidence offered to show any such. Hence the clause of the instruction mentioned, was merely a harmless superfluity.

The only objection to the third instruction of the plaintiffs is, that there was no evidence to support it. If so, it could have done no harm, and at all events the jury was qualified to pass upon this.

Of the three instructions refused, when asked by defendants, the first two, merely raise the same questions already decided by the court in regard to the admissibility of the contract in evidence. The third one, refused, (No. 9, in the list,) was clearly wrong, and properly refused, as it called on the court to decide on a fact, which it was the province of the jury to determine.

The questions really controverted in this case were purely questions of fact, growing out of the details of the settlement between the parties to this contract. No evidence was objected to on either side, and all the matters were submitted to the jury under very full instructions on both sides, of which there is no complaint except as above noticed.

The judgment is affirmed. The other judges concur.

Leach v. Koenig.

WILLIAM S. LEACH, Appellant, vs. GEORGE KOENIG, Respondent.

1. *Sheriff's sale—Bid—Deed—Title passes, when.*—Until the money is paid and the deed executed, the bidder at a sheriff's sale acquires no title.
2. *Sheriff's deed, relates back, when.*—A sheriff's deed, as to defendant in execution and his privies, and as to strangers purchasing with notice, relates back to the date of the sale, and vests the title in the execution purchaser from that time.
3. *Landlord and tenant—Attornment, void when.*—The attornment of a tenant to a stranger except in the cases mentioned in the statute, is void. (See Wagn. Stat., 880, § 15.)

Appeal from Buchanan County Circuit Court.

Chandler & Sherman, for Appellant.

The sheriff's deed relates back to the date of sale. (Winston vs. Affalter, 49 Mo., 263.)

After the sheriff's deed to appellant, the latter exhibited his deed to respondent and demanded rent, as he had a right to do, having succeeded to Saltzman's estate. (Wagn. Stat., 883, § 38; Walker vs. Harper, 33 Mo., 592.)

The attornment of Koenig to Pinger was void. (Wagn. Stat., 880, § 15; Schultz vs. Arnot, 33 Mo., 172; Rutherford vs. Ullman, 42 Mo., 216.)

Allen H. Vories with Thomas & Ramey, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding originally instituted before a justice of the peace under the Landlord and Tenant Act, to recover one month's rent, claimed to be due, and also possession of the premises.

By the record it is shown, that the premises in question were originally owned by one Augustus Saltzman, and that on the 29th day of June, 1870, a judgment was rendered against him for the sum of two thousand dollars. Execution was issued on this judgment, and the property was sold on the 24th day of September, 1870, and was bid off at the sheriff's sale

by one Maria Saltzman at the sum of twenty-one hundred dollars. Maria Saltzman failed to pay the amount bid by her, and on September 11th, 1871, she gave an order in writing to the sheriff, to make the deed to the plaintiff, and thereupon the plaintiff paid the amount of the purchase money and the sheriff executed to him a deed dated September 14th, 1871.

On December 24th, 1870, after the rendition of the judgment and the sale thereunder had taken place, Augustus Saltzman, Maria Saltzman and Conrad Saltzman, her husband, conveyed the premises to John Pinger, in trust for the use and benefit of Henrietta Saltzman; and on the 3rd of February, 1871, Pinger, the trustee, the said Henrietta joining with him, leased the premises to the defendant for the term of one year, with the privilege of continuing the same for the term of two years. There was also evidence tending to prove, that Augustus Saltzman rented the property to the defendant on the 3d day of January, 1871, at the annual sum of five hundred dollars, the rent to be paid monthly; that three months' rent had been paid to said Saltzman, and that the latter never consented that the rent should be paid to any other person; and that the plaintiff, after he received his deed, exhibited the same to the defendant and demanded the month's rent which was due, and that payment was refused. Upon this evidence the court instructed the jury, that the plaintiff could not recover, and in accordance with the rulings of the court, the jury returned a verdict for the defendant.

The statute provides, that any person purchasing lands and tenements, occupied by any tenant or lessee or sub-lessee at the time of such purchase who shall at any time thereafter fail to pay rent to such purchaser, upon such failure the person purchasing such property shall have the right to commence proceedings before a justice of the peace to recover possession. But before such proceedings are commenced, the plaintiff or his agent must make a demand of rent, as provided for, and at the time of making the demand, must exhibit to the tenant or person in possession of the premises, the deed under which he claims title, and if then payment is refused,

the owner may commence his action as aforesaid. (2 Wagn. Stat., 883, 884, §§ 38, 39.)

If then, at the time the deed to the plaintiff became operative and effective to pass the title to him, the defendant was Saltzman's tenant, the action was well brought.

The deed made to Pinger on the 24th day of December, 1870, by Augustus Saltzman and Maria Saltzman and her husband, transferred no title except what Augustus Saltzman possessed. Maria Saltzman had no title; she acquired none under the sale, and therefore could convey none. She bid in the property, but she paid nothing therefor, and, as a consequence no title vested in her. A title to land purchased at a sheriff's sale can only pass by the purchaser's obtaining a deed. Until the money is paid and the deed is executed the bidder gets nothing. The first time that any title passed was on September 14th, 1871, when the plaintiff paid the amount of the bid, and the sheriff executed to him a conveyance.

The only question then important to be considered, is when the deed took effect, and whether it related back to the day of the sale. The doctrine of relation is a fiction of law adopted by the courts for the purposes of justice, and it has been often held in this court, that a sheriff's deed relates back to the sale as to the defendant in the execution and his privies, and as to strangers purchasing with notice, and vests the title in the execution purchaser from the time. Whatever title Pinger took was derived directly from Augustus Saltzman, and therefore held in privity in estate with him, and so far as he was concerned the sheriff's deed would relate back. Again, Saltzman, the execution debtor, had previously rented the property for a year to the defendant, and under that renting he had gone into possession and there was evidence tending to show that Saltzman had never consented to defendant's attorning to any other party. If that were so, the recognition of any other landlord under the subsequent lease was void.

Wherefore the judgment should be affirmed. The other judges concur. Judge Vories did not sit.

Lee v. Dunlap.

JOHN LEE, Respondent, *vs.* HORACE L. DUNLAP, Appellant.

1. *Practice, civil—Instructions—Promissory notes—Jeofails, statute of, etc.*—An instruction, which leaves it for the jury to determine the question whether the instrument sued on was a promissory note, is bad; but where that question is wholly immaterial to the issue and is purely technical, *held*, that under the statute of jeofails (Wagn. Stat., 1036, § 19) such error would not authorize a reversal of the cause. (See also Wagn. Stat., 1067, § 33; 1034, § 5; 1037, § 20.)

Appeal from Linn Common Pleas.

C. D. Pratt, for Appellant.

S. P. Huston, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

Action in the Linn County Court of Common Pleas on an instrument in this form :

(§55.00.) BRAZOS SANTIAGO, TEXAS, NOV. 16th, 1864.

On hand in trust for Private, John Lee, fifty-five dollars.

HORACE L. DUNLAP,

Capt. 62d U. S. C. Inf., Com'd'g Co. C.

This was declared on as a promissory note. Defendant admitted in his answer that he executed the paper sued on, but denied that it was a promissory note, or that it was understood to be such at the time of its execution. He also pleaded payment, release, &c., and at the trial which occurred several terms after suit brought, objected to the instrument sued on being read in evidence, on the ground that it was not a promissory note. This objection was overruled and the paper read. The evidence was conflicting as to the payment, release, &c., set up in the answer; but the instructions on this point, given as well at the request of the defendant as for the plaintiff, were unexceptionable. By another instruction however, it was in effect left to the jury to say whether the instrument filed with the petition was a promissory note. This ought not to have been done; but we will not, while our statute of jeofails remains in force, reverse a judgment on a purely technical ground like this. Whether the instrument was or was not a promissory note it is wholly immaterial to inquire.

Blount v. Zink.

It is sufficient to observe, that this trial has not resulted in any error "materially affecting the merits of the action." (See § 33, 2 Wagn. Stat., 1067; *Id.*, § 5, 1034; *Id.*, § 19, 1036; *Id.*, § 20, 1037.)

Judgment affirmed; all concur.

—o—

JAMES BLOUNT, Appellant, vs. NATHANIEL ZINK, Respondent.

1. *Practice, civil—Appeal—Record—Motions.*—Motions in arrest and for a new trial constitute no part of the record, unless they are incorporated in the bill of exceptions.

Appeal from Andrew Circuit Court.

Heren & Rea, for Appellant.

Strong's and Bennett Pike, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court

Action for recovery of specific personal property. It is impossible to notice the various errors assigned in this case, as it does not appear from the record that the attention of the court below was called to them by a motion for new trial. It is true, that motions for new trial and in arrest have been copied into the transcript by the clerk, but such motions form no part of the record, unless made so by being incorporated in the bill of exceptions. (See 1 Mo., 262; 10 Mo., 457; 11 Mo., 214; 15 Mo., 208; 21 Mo., 112; 22 Mo., 336; 25 Mo., 565; 36 Mo., 400; 37 Mo., 31; 51 Mo., 115; 52 Mo., 118.)

Judgment affirmed. All the judges concur.

Smith v. The City of St. Joseph.

THOMAS R. SMITH, Respondent, *vs.* THE CITY OF ST. JOSEPH,
Appellant.

1. *Damages for injury to married woman—Separate action for, will lie, by both wife and husband.*—For injuries received by a married woman, two actions for damages will lie, one by the wife and solely for damages resulting to herself, in which the husband is made a nominal co-plaintiff under the requirements of the statute; another by the husband alone for expenses and loss of her services incurred by him in consequence of the injury, and also in aggravated cases for compensation for his own services in waiting upon his wife during her illness.

Appeal from Buchanan Circuit Court.

Chandler & Sherman, for Appellant.

I. Compensation for plaintiff's services in waiting upon his wife should have been claimed in the first suit. Plaintiff cannot split his cause of action.

II. The law gives no such damages.

III. The petition makes no claim therefor. (Sedg. Meas. Dam., 682, n. 1; 52 Me., 378; 2 Greenl., 284; 25 Ill., 86.)

Vineyard & Loan, for Respondent.

I. The damages in the two cases are entirely different. In the former, the damages were incurred only by Mrs. Smith, in the latter they were suffered by the husband. (Rogers vs. Smith, 17 Ind., 323; Berger vs. Jacobs, 21 Mich., 215; Kavanagh vs. Janesville, 24 Wis., 618; Hooper vs. Haskell, 56 Me., 251; McKinney vs. Western Stage Co., 4 Iowa, 420; Fuller vs. Naugatuck R. R. Co., 21 Conn., 557; Lewis vs. Babcock, 18 Johns., 443; Long vs. Morrison, 14 Ind., 595; Robalina vs. Armstrong, 15 Barb., 247.)

WAGNER, Judge, delivered the opinion of the court.

This was an action instituted by the plaintiff to recover damages for the loss of the services of his wife, and necessary expenses of medicine, doctor's bills and nurse hire paid out by him, in consequence of an injury to her which is alleged to have been occasioned by the negligence of the defend-

ant. The charge is, that the injury to the plaintiff's wife was the result of her falling down an embankment in one of the streets of the defendant, which was negligently left in an exposed and dangerous condition. One branch of this case has previously been in this court. (Smith vs. City of St. Joseph, 45 Mo., 449.) There the proceeding was in favor of the wife as the meritorious cause of action, the husband being joined with her under the requirements of the statute, to recover damages for the personal injuries and physical suffering that she sustained. But the petition was founded upon the same accident, and the same questions in regard to defendant's liability and negligence arose in that case that arise here.

The rules of law then laid down, were strictly conformed to and pursued in the trial of this case, on the questions of defendant's liability and negligence, and therefore it is unnecessary to review them at the present time.

There is one point of objection raised to the sufficiency of the petition, on the ground that it is not alleged that the city had graded or improved the street where the injury occurred, but this objection is not maintainable. The petition is not drawn very precisely or accurately, but it contains an allegation that before the accident happened, the defendant had certain hands and workmen engaged and employed in grading the street, and that they graded it in such a manner as to leave a perpendicular embankment which was the occasion of the injury. This averment, though vexatiously inartificial, stated essentially the fact that the defendant had commenced and been engaged in grading the street, and left no doubt as to what the pleader intended.

The main questions, however, relied on for a reversal of this judgment, are, that the former judgment was a bar to the maintenance of this action, and that the court erred in its instruction in reference to damages. The judgment rendered in favor of plaintiff and wife in the former suit was solely for the damages resulting to the wife in consequence of the injuries received by her. She was the meritorious cause of the action, and the husband was merely joined under the pro-

visions of the statute to enable her to sue. But the damages there were strictly confined to her personal injuries, and the expenses incurred by the husband, and loss of service which constitute the foundation of this action were not in that case. In some of the New England States, under the provisions of statutes regulating the subject, it is held that but one action can be maintained. Those statutes permit all the damages incident to and growing out of the injury to be recovered in the same suit. They provide for but one action. But in the other States, where no such statutory regulations exist, a contrary doctrine is held. In the case of *McKinney vs. Western Stage Co.*, (4 Iowa, 420,) the court says "we suppose that at common law the rule is well settled, that for an injury to the person of the wife during coverture, by battery, or to her character by slander or any such injury, the wife must join with the husband in the suit. When, however, the injury is such that the husband receives a separate loss or damage, as, if in consequence of the battery, he has been deprived of her society, or has been put to expense, he may bring a separate action in his own name. *Barnes vs. Hurd*, 11 Mass., 59; *Lewis vs. Babcock*, 18 Johns., 443; 2 Saund. Pl. & Ev., 568; and this rule we do not understand to be changed by the code."

The Indiana Court holds, also, that the established doctrine is, that for a tort committed upon a wife, two actions will lie, one by the husband alone for the loss of service, expenses, &c., and the other by the husband and wife for the injury to the person. (*Rogers vs. Smith*, 17 Ind., 323; *Long vs. Morrison*, 14 Ind., 595; *Ohio & M. R. R. Co. vs. Tindall*, 13 Ind., 366; *Boyd vs. Blaidell*, 15 Ind., 73.)

In the case of *Fuller vs. Naugatuck R. R. Co.*, (21 Conn., 557,) it was said that it was clear that the plaintiffs could not recover for the wife's personal injury and also for the expenses of her cure in the same action. On the former ground of damages, the husband would have no interest, while the latter would accrue to him alone, and so the two claims would be incompatible with each other. The same principle has been often adjudged in different cases and laid down in elementary treatises. (*Reeves*

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Dam. Rel., 291; Whitney vs. Hitchcock, 4 Denio, 461; Cowden vs. Wright, 24 Wend., 429; Bartley vs. Ritchtmeyer, 4 N. Y., 38; Klingman vs. Holmes, 54 Mo., 304.)

We think there can be no doubt respecting the maintenance of the action, and that there is no bar in consequence of the previous recovery. On the question of damages the court instructed the jury, that if they found for the plaintiff they should assess his damages at such sum, as was shown by the evidence would compensate him for the expenses he had necessarily incurred, in nursing and taking care of his wife for the time she was diseased and disabled on account of the injury she had sustained in falling over the embankment, including compensation for his services in waiting upon her, doctor's bills, and costs of medicines and also for the loss of her services directly resulting from the injury. The only serious objection made to this instruction is, that it allows the plaintiff to recover compensation for his services in waiting upon his wife during her illness. Under all the circumstances surrounding this case, I think the instruction was right. The evidence shows that the wife's thigh bone was broken by the fall; that for two months she was so utterly helpless that her husband had to be constantly at her bedside and assist her even to move. During all this time he did not take off his clothes, as his attentions were required to be unceasing and unremitting. The husband then had to neglect all his business to perform this painful duty, and if he had not done it in person, he would have been under the necessity of hiring some one to do it in his stead. In this aspect of the case therefore, I think the instruction was justified.

There is no reason for interference on the ground that the damages were excessive. The verdict was for \$3500, and the wife was confined to her bed for a year before she could even get around the room on crutches; she was constantly using medicine all that time, and under the attendance of physicians, and extra servants had to be employed. Before the accident, she was a healthy young woman about thirty-one years old and a good housekeeper, and superintended the domestic affairs of the family, and did all the sewing for them. She had

a family of six small children, and they and her husband have lost the benefit of her services. Seven years had elapsed from the occurrence of the injury up to the time of the trial, and the husband for that length of time had been deprived of her services, and will be as long as she lives, for it is conceded that the accident has rendered her a cripple for life. Taking all these things together, and the estimate placed upon the loss of services by the witnesses, and the actual expenses laid out and incurred by the plaintiff, we are not prepared to say that the jury placed the compensation too high.

Wherefore it follows that the judgment must be affirmed. All the judges concur.



THE STATE OF MISSOURI, Respondent, *vs.* HENRY EVANS,
Appellant.

1. *Practice, criminal—Jurors, competency of.*—The examination of jurors in a certain cause showed that they had not formed or expressed an opinion concerning any material fact in controversy, which would influence their judgment, and were not related to the party. *Held* to be competent.
2. *Practice, criminal—Evidence—Who the perpetrator—Admissions of third parties.*—In a criminal case, the defendant cannot introduce the admissions of a third party tending to show that such party, and not the defendant, committed the crime charged.
3. *Practice, criminal—Reasonable doubt, what is.*—A "reasonable doubt" of defendant's guilt, such as will justify an acquittal, must be a substantial doubt of guilt and not a mere possibility of innocence.

Appeal from Buchanan Circuit Court.

Musterson, Thomas & Tyler, for Appellant.

The admissions of Conner were admissible in evidence as part of the *res gestæ*.

H. Clay Ewing, Att'y Gen'l, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted for and convicted of arson in

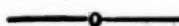
the second degree (1 Wagn. Stat., 453, § 3), in setting fire to and burning the office of John C. Bender, which was situated adjoining to the inhabited dwelling house of John A. Lewis.

The indictment is not liable to any valid objection. The offense set out is charged in the language of the statute, and that is sufficient.

When the jury was being impaneled, the defendant proposed asking the following question of the jurors: "Has any one of you ever had his house burnt, or attempted to be burnt by an incendiary? If so, would that fact tend to prejudice you against the defendant in making up your verdict herein?" The court refused to allow this question to be put to the jurors, and the defendant excepted. There can be no question as to the correctness of the decision. If they had not formed or expressed an opinion concerning any material fact in controversy, which would influence their judgment, and they were not related to the party, then they were unexceptionable and competent to serve upon the jury. An attempt was made by the defendant to introduce the admissions of a third party, tending to show that it was that party that committed the crime and not the defendant. This evidence the court ruled out, and it was clearly right in doing so. The evidence was mere hearsay, and under no circumstances was it admissible.

The only objection to the instructions is in the manner of the court's defining what constituted a reasonable doubt. The defendant asked a declaration that, if from all the evidence in the case the jury have a reasonable doubt of defendant's guilt, they will acquit him. This declaration the court refused; but gave an instruction telling the jury, that, if from all the evidence in the case they have a reasonable doubt of defendant's guilt, they will acquit. But such a doubt, to authorize an acquittal, must be a real and substantial doubt of defendant's guilt, and not a mere possibility of his innocence. This instruction given by the court has been so often approved in the practice of this State, and its correctness is so thoroughly established, that it would be idle to cite authorities in its support.

There is nothing in this case. The rulings of the court below were correct throughout, the jury found the defendant guilty upon sufficient evidence, and the judgment must be affirmed. The other judges concur.



**Z. G. JONES, Defendant in Error, vs. BERNARD HANNOVAN,
Plaintiff in Error.**

1. *Lands—Surface-water—Drainage—Water-courses.*—A proprietor of land may drain surface-water from his land in such way as may suit him, provided he does so in an usual and careful manner, without being responsible to others; but such water, after emptying into a stream, ceases to be surface-water and becomes a part of the stream.
2. *Damages—Instructions—Benefits—Injury, nominal.*—A plaintiff is entitled to damages when defendant has caused water to overflow plaintiff's land; but if no pecuniary damages are proved, such damages are only nominal; and the court is not required to instruct that the defendant is entitled to a verdict, provided the benefits accruing to the plaintiff from defendant's acts have been greater than the injuries arising therefrom.

Error to Carroll Circuit Court.

Ray & Ray, for Plaintiff in Error.

I. Defendant had the right to drain the surface-water from his own land by ditches and embankments thereon, and if said ditching and embankments were done on his own lands with reasonable care and skill, and plaintiff is incidentally inconvenienced or injured thereby, he is without remedy. The case is one of "*damnum absque injuria*." (Swett vs. Cutts, Amer. L. Reg. [Jan. 1872], 11, and cases cited; Waffler vs. N. Y. Central R. R., 58 Barb., 413; Goodale vs. Tuttle, 29 N. Y., 459; Curtis vs. Eastern R. R., 14 Allen, 55; Bowlsby vs. Speer, 2 Vroom, 351; Miller vs. Laubach, 47 Penn. St., 154; Buller vs. Peck, 16 Ohio, 334; Wheeler vs. City of Worcester, 10 Allen, 591; Basset vs. Salisbury Manuf. Co., 3 Amer. L. Reg. [N. S.], 223; Chatfield vs. Thilson, 28 Vt., 49.)

L. H. Waters, for Defendant in Error.

I. The owner of the higher ground can do nothing to aggravate the servitude of the lower. An action will lie when the natural servitude is made more burdensome. (*Martin vs. Jelt*, 22 La., 501; *Martin vs. Riddle*, 26 Penn., 418; *Kauffman vs. Guisemer*, 26 Penn., 407.)

II. The ditch of defendant altered the natural drainage so as to throw upon plaintiff's land water that he had not received before. (*Bentz vs. Armstrong*, 8 Watts. & S., 40; *Miller vs. Laubach*, 47 Penn. St., 154; *Bellows vs. Sackett*, 15 Barb., 96.)

III. If the ditch in question increased the quantity of water upon plaintiff's land, or, without increasing the quantity, threw it upon his land in a different manner from what the same would naturally have flowed, then the defendant is liable. (*Livingston vs. McDonald*, 21 Iowa, 160; *Butler vs. Peck*, 16 Ohio St., 334; *Ang. Wat.*, 108.)

IV. The defendant's liability was fixed by his interference with the natural drainage. (*Sedg. Meas. Dam.*, 157.) No infringement of the rights of another can be justified on the ground that the act is a benefit to the owner. (*Tillotson vs. Smith*, 32 N. H., 20; *Jewett vs. Whitney*, 43 Me., 242; *Ang. Waterc.*, § 433.)

V. Even a supposed benefit cannot be forced upon another against his will. (*Webb vs. Portland Manuf. Co.*, 3 Sumn., 202.)

VORIES, Judge, delivered the opinion of the court.

This action was brought to recover from the defendant damages for the unlawful diversion of the water of a water-course from its natural channel, and turning the waters thereof on the plaintiff's lands, by which he claims to have been damaged. The petition charges, that the plaintiff is the owner of a tract of land in Carroll county, Missouri; that the defendant in the year 1867 wrongfully diverted the channel of a certain stream of water running in near proximity to said land, and wrongfully dug ditches and threw up embankments

near to and along the side of plaintiff's land, by which said wrongful diversion of the channel of said stream, and digging of said ditches, and throwing up of said embankment, plaintiff's land was overflowed by said water, &c., and by all which he has sustained damages, for which judgment is prayed in the sum of five hundred dollars.

The answer of the defendant simply denies the allegations in the plaintiff's petition. A trial was had before a jury. On the trial the plaintiff introduced evidence, tending to prove that he and the defendant were the owners of adjoining tracts of land; the land owned by the plaintiff being the land described in the petition; that there were two small creeks or streams of water running over or through defendant's land, one of which ran near to or upon the corner of the plaintiff's land and caused a small quantity of the land to be wet and swampy, but that the waters of the other stream, it being the larger of the two, did not in any way affect the plaintiff's land; that in 1867, the time named in the petition, the defendant had dug a ditch on his own land, by which he carried the water of one of these streams to the channel of the other, and, after uniting the waters of the two streams, defendant had carried their combined waters in a ditch to the dividing line between the lands of plaintiff and defendant, where the ditch was turned, making an angle, and then continued south between the lands of plaintiff and defendant, but on the defendant's own land; that in digging the ditch the earth was thrown on the defendant's land, making an embankment on the defendant's side of the ditch; that, when the streams of water in the ditch became swollen, the water at the angle of the ditch was forced over and ran upon plaintiff's land, and it was damaged thereby. A map was given in evidence, showing the situation of the plaintiff's and defendant's lands, and the water streams on the defendant's land, and also the course and situation of the ditch. The defendant introduced evidence tending to prove, that the ditch made by him, while it might force some water on the plaintiff's land at a time of heavy rains, yet it drained water from the land, as much or more

than was forced on it by the ditch, and that the land was not made less valuable by the ditch and embankment. The defendant's evidence also tended to prove, that plaintiff had at one time consented, that, if the defendant would extend the ditch a considerable distance further, he would be satisfied, which the evidence tends to prove was done. At the close of the evidence, the court gave a great number of instructions for the respective parties, and refused two instructions asked for by the defendant. The defendant objected to the giving of the instructions on the part of the plaintiff, and excepted to the opinion of the court in refusing the two instructions refused on the part of the defendant. It is not requisite that these instructions should all be stated in full, in order to a proper understanding of the case. The jury returned a verdict for the plaintiff for the sum of \$74.99.

The defendant filed a motion to set aside the verdict and grant a new trial, which being overruled he excepted, and has brought the case here by writ of error.

The only question raised in this court by the defendant is as to the propriety of the action of the court in the giving and refusing of instructions to the jury. The court instructed the jury on the part of the plaintiff, as follows:

"If the jury believe from the evidence in this case, that the defendant in the fall of 1867 dug or deepened a ditch, whereby the water of one drain or stream was diverted from its usual channel or bed, and caused to flow in a new direction, and that thereby the whole or any part of the water of such drain or stream was made to flow or did flow upon the land of the plaintiff, then the plaintiff is entitled to recover, irrespective of damages done to his land."

2nd. "The main question in this case for the jury to determine is, whether the defendant, by the digging, or deepening, of a ditch in the fall of 1867, caused water to flow on to the plaintiff's land, which would not have flowed upon it had such ditch never been dug or deepened, and if from the evidence in the case the jury shall believe that such a state of facts exists, then they must find for the plaintiff."

3rd. "In determining this case and making up their verdict, the jury must take into consideration all the evidence in the case, and if the jury believe, that the defendant in 1865 dug a ditch from the foot of the pond, shown upon the map offered in evidence, in a westerly direction to a drain, and that in the fall of 1867 the defendant deepened that ditch and continued it in a south-westerly direction to the line of plaintiff's land, and thence south along the line between the land of plaintiff and defendant, and that, by said deepening and lengthening of said ditch in the fall of 1867, any water was diverted from its usual course and flowed in part upon plaintiff's land, no matter from whence said water came, then the plaintiff is entitled to recover, and the jury will assess his damages at not less than one cent, and at such greater sum as the evidence in the case has shown that the plaintiff has sustained."

4th. "Although the jury may believe from the evidence, that the ditch along the line, between the plaintiff's and defendant's land, would in an ordinary season be of advantage in draining the plaintiff's land, yet if they also believe from the evidence, that the entire ditch taken together by the digging and lengthening in 1867 did in the Spring of 1868, by combining the waters of the two creeks, shown on the map offered in evidence by plaintiff, overflow more of plaintiff's land than would have been overflowed had the waters of the two creeks remained apart, then the plaintiff is entitled to recover in this action."

The defendant objects to these instructions, and insists that the defendant had the right to drain the surface-water from his own land, by ditching and embankments made thereon, to render it more wholesome, useful, and productive; and that if the ditching and embankments were made or done on his own land with reasonable skill, and plaintiff was incidentally injured thereby, he is without remedy. This as a general rule is unquestionably the law; each proprietor may control merely surface-water, so as to protect himself, and drain it off from his own land. Surface-water is considered a com-

mon enemy that each proprietor may and must fight for himself, with a view to protect himself, without being responsible to others therefor, provided he does so in an usual and careful manner.

This was held in a recent case decided in this court, where the authorities on the subject were considered and referred to—*Imler vs. City of Springfield*, *ante p.* 119; but that question does not and cannot arise in this case. The petition in this case charges the defendant with diverting the waters of a water-course; the evidence in the case all refers to the diversion of two water-courses, nothing is said or hinted at, in either the pleadings or evidence, about surface-water. A map or profile was offered in evidence and is relied on as correct by both parties, on which is laid down the two water-courses and the ditch, and in which the manner is shown, by which the water was taken from the water-courses and conducted by the ditch. It is true that the evidence shows, that the water falling on the high lands around in case of heavy rains is naturally conveyed in these streams and swells the volume of water conveyed by them; but as soon as the water enters these streams and commences to flow in their channels, it ceases to be surface-water and constitutes a stream of water or water-course.

All water-courses are made up more or less from surface-water, but after it enters into the stream and commences to flow within its banks, it is no longer to be considered surface-water. (*Rose vs. City of St. Charles*, 49 Mo., 509.) The instructions given, when all taken together, only refer to the water taken from these creeks or small water-courses, and I think fairly presented the case to the jury. It is true, that by the third instruction it is said, that, if the water was diverted out of its usual course and flowed in part upon the plaintiff's land, no matter from whence the water came, the plaintiff is entitled to recover; but this cannot refer to surface water, and the jury could not so have understood it; for the whole instruction, when taken together, makes it evident that the water taken from the water courses was what was intended. No question

seems to have been made on the trial about surface-water, or anything else but the changing of the course of, and the uniting of the water of the two streams shown in the evidence, and the instructions must have been so understood by the jury. The only remaining question in the case is as to the measure of damages. The defendant asked the court to give the jury the following instructions, which were refused by the court:

"That if the jury believe from the evidence, that plaintiff's land is benefited rather than injured by the ditch in question, they will find for the defendant.

That if the jury believe from the evidence, that the ditch in question carried more water from plaintiff's land than it conducted on the same, then they will find for the defendant."

The refusal of the court to give these instructions is insisted on as error in this court. The court had already instructed the jury, that, if the plaintiff had received no pecuniary damage by the flow of the water on his land, they could only find one cent damages. This was all that the law required. In such cases the law presumes nominal damages when no damages are proved. (Sedg. Meas. Dam. [4 Ed.], side p. 137.) There were a number of other instructions given not referred to in this opinion, but they have no tendency to change the principles involved in the ones herein referred to, and no other points having been made in the case, and the judgment appearing to be for the right party, it will be affirmed.

The other judges concur.

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GEORGE W. ADAMS AND JAMES M. SCOTT, Defendants in Error, vs. MARY A. HELM, Exec'x &c., Plaintiff in Error.

1. *Equity—Mixed question of law and fact—Opinion of jury—Statute, construction of—Reversal.*—In equitable proceedings, the court cannot, under the statute (Wagn. Stat., 1041, § 13), submit to a jury for its opinion a mixed question of law and fact, but the error is not such as will justify the reversal of the judgment, the whole case having been heard and pronounced upon by the court itself.

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2. *Tender, how must be accepted.*—A party must accept a tender as made, or he must reject it; he cannot accept it and prescribe the terms of his acceptance.
3. *Tender—Time of—Objection as to, when waived.*—A party is presumed to waive the objection that a tender is not in time, if he does not raise that objection when the tender is made.

Error to Linn County Court of Common Pleas.

G. D. Burgess and Harry Lander, for Plaintiff in Error.

I. Our statute (Wagn. Stat., 1041, § 13) does not allow the court to submit the whole issue to the jury.

Samuel P. Huston & George W. Easley, for Defendants in Error.

ADAMS, Judge delivered the opinion of the court.

This was an action in the nature of a bill in equity to compel the defendants to surrender and cancel certain notes secured by a deed of trust on a number of town lots, and to acknowledge satisfaction of the deed of trust.

The plaintiffs alleged in their petition, that the whole amount of all the notes secured by the deed of trust had been fully paid.

The defendant denied the allegation of payment, and alleged that a large amount was still unpaid. The defendant, Helm, further alleged in her answer, that the plaintiffs had delivered her certain notes, secured by a deed of trust, as collateral security, and that she still held them as collaterals, and offered to deliver them up. The plaintiff replied to this part of the answer, and denied that said notes were delivered as collaterals, and charged that they were tendered and delivered as full payment of the balance due under the deed of trust held by defendant.

The court, against the objection of defendant, submitted the issue of payment to a jury, and the jury found it in favor of plaintiffs.

The deed of trust referred to contains this provision: "Said Helm agrees to take notes secured by a deed of trust on lots

sold, in sums of one hundred dollars and less, running one and two years, if bearing the same rate of interest, to be received as cash."

The plaintiffs, after all the notes secured by the deed of trust in suit became due, tendered in discharge of the balance—which had not been paid—notes secured by a deed of trust to the amount of some forty-three hundred dollars. When this tender was made, the defendant took the notes and deed of trust, remarking at the time, that she would not receive them in satisfaction, but only as collaterals.

The plaintiff replied, that they tendered them in full satisfaction, and if she kept them she must take them as tendered. The defendant did not return the notes or offer to return them when tendered, but held on to them, protesting that she held them as collaterals; and the plaintiffs insisting that they delivered them as a tender under the deed of trust in full satisfaction of what was due. This was substantially the evidence in regard to the alleged payment, and that was the material matter in dispute.

The defendant asked the court to disregard the verdict of the jury, which the court refused to do. The defendant then offered to amend her answer before the court proceeded further with the case, but the court refused to permit the amendment. The amendment offered was substantially, that Adams had suffered judgments to be rendered against him before the execution of the mortgage securing the notes tendered as collaterals on the deed of trust held by defendant, of which defendant was ignorant, and that he assured defendant, that the property was unincumbered, and also that the plaintiffs had conveyed away their interest in the property held under defendant's deed of trust.

The court then proceeded with the trial of the case, and there being no further evidence offered or given, the court upon the whole case found for the plaintiffs, and rendered a decree as prayed for by them. Motions for a new trial and in arrest having been overruled, the defendant excepted and brings the case here for review by writ of error.

The issue of payment, which was submitted to the jury in this case, was not a simple or specific question of fact, but involved questions of law and fact, and was, therefore, not such an issue as the court, under section 13, 2 Wagn. Stat., 1041, is authorized to submit to a jury for their opinion. Under that section the court must try the issue, but may take the opinion of a jury upon any specific question involved therein by an issue made up for that purpose. But although there was an error in thus submitting this issue, it is not such error as will justify a reversal of this judgment. The whole case was heard and pronounced upon by the court itself, and the whole case is now before us for our consideration on all the facts as detailed in evidence in the trial court.

The only material question is, whether the tender and acceptance of the notes and deed of trust securing the same, as made by the plaintiffs, amounted to a payment or discharge of the balance of their indebtedness to the defendant, Helm.

The tender was made on that express condition, and under a protest to that effect. It was Helm's duty either to refuse it or accept it on the terms as made. She had no right to accept the tender and prescribe the terms of her acceptance. She should have refused the tender or returned the notes and deed of trust at the time, or she must be held to the terms of the tender as prescribed by the debtor. The point that the tender was not made in time has no force in it. A creditor may waive the time, and when he does not raise that objection, he must be presumed to have waived it.

The amendment to the answer did not offer a material defense. It alleged, that the notes were received as collaterals.

If that be admitted, it is immaterial to the trial of this case whether they were secured or not; for if they were merely taken as collaterals, that of itself would have been a complete answer to the plea of payment, and whether they were so taken or not, was the only mooted question on the trial. Nor was it material, whether the plaintiffs had conveyed away their interest in the equity of redemption in the lots held under this deed of trust; for whether they had conveyed

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away their interest or not, they would still be personally liable for the debt if unpaid, and if they gave covenants for title, they would be liable on such covenants. They were therefore deeply interested in having the deed of trust acknowledged satisfied, and in having the outstanding notes cancelled.

On the whole case, the judgment seems to be for the right party.

Judgment affirmed; all the judges concur.

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AUGUSTUS C. HONAKER, et al.. Defendants in Error, vs. DAVID SHOUGH, Plaintiff in Error.

1. *Mortgage to county—Irregular foreclosure—Sale—Title of purchaser as against mortgagor.*—Where the order of a county court foreclosing a mortgage given to the county to secure a school debt, did not truly recite the debt so as sufficiently to identify the mortgage, *held*, that sale thereunder did not transfer any legal title, but the purchaser became in equity entitled to the mortgaged debt, and might use the forfeited mortgage to protect him in the possession of the premises against the mortgagor and his heirs. In such case the latter may redeem; and until then the purchaser must account for the rents and profits, which however, may go to the satisfaction of the mortgage debt. (See *Jones vs. Mack*, 53 Mo., 147.)

Error to Buchanan Circuit Court.

A. H. Vories, for Plaintiff in Error.

I. This was a proceeding brought under section 34 of the Dower Act (Wagn. Stat., 544).

II. The sale transferred to defendant the interest of Holt county in the mortgage, and he being in possession of the land as mortgagee, had the right to so remain until said debt was paid and the land redeemed by Honaker's heirs—he being substituted to the rights of Holt county and an assignee of said mortgage. (See *Walcoy vs. McKinney*, 10 Mo., 229; *Winslow vs. McCall*, 32 Barb., 241; 1 Hill. Mort., 537, § 3, ch. 18, "Assignment of a Mortgage;" *McCormick vs. Fitzmorris*, 39 Mo., 34; *Woods vs. Hilderbrand*, 46 Mo., 284;

Johnson vs. Houston, 47 Mo., 227; Jackson vs. Magruder, 51 Mo., 55.)

B. R. Vineyard, for Defendants in Error.

I. The plaintiff in a suit like this cannot, as in ejectment, be defeated by showing an outstanding mortgage given by the owner through whom plaintiff claims. The section under which this action was brought (§ 34, Wagn. Stat., 544), only requires that the plaintiffs be heirs, or have an interest in the real estate from which dower is sought to be set apart.

II. The mortgage does not prescribe the manner in which the sheriff should sell the real estate; or the place where it should be sold; nor the terms of sale; nor the length of notice required to be given; nor whether it should be a printed or written notice; nor whether the sale should be a private or a public one.

III. A sheriff's sale of lands mortgaged under the school law is void, when the sale is made during the session of the county court. (*Dollarhide vs. McClurg*, 51 Mo., 347.)

IV. Not a single one of the recitals required by the statute to be made, can be found in the deed of the sheriff, except the bare allegation that the County Court had made an order for him to sell. (See *Buchanan vs. Tracy*, 45 Mo., 442; *Lackey vs. Lubke*, 36 Mo., 121; *Turner vs. Stine*, 18 Mo., 580; *State Bank vs. Bray*, 37 Mo., 194.)

V. The sheriff's sale was an absolute nullity, plaintiff not being a legal or even equitable assignee of the mortgage.

ADAMS, Judge, delivered the opinion of the court.

The plaintiffs, as heirs at law of one Henry Honaker, who died in 1863, commenced this proceeding under the Dower Act, in the Holt Circuit Court, which was transferred to Buchanan Circuit Court by change of venue. The petition charges, that the ancestors of the plaintiffs died seized in fee of the S. 1-2 of N. W. 1-4 of Sec. 9, and N. 1-2 of S. W. 1-4, of Sec. 9, in Township 61, of Range 37, in Holt county which embraced the Mansion House of the deceased; that

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deceased left a widow named Mary J. Honaker, who being entitled to dower and possession of the mansion, &c., till the same was admeasured, and sold and conveyed her rights in the premises to the defendant who holds possession thereof under such purchase. The petition further alleges, that the plaintiffs as heirs at law are entitled to the said lands, subject to the widow's dower, and asks that such dower be admeasured and set off to the defendant as assignee of the widow.

The defendant by answer denied the plaintiffs' rights as heirs at law, by charging, that the deceased in his life-time had conveyed away all his interest in said lands, and that defendant owns the same.

The facts showed, that the plaintiffs were the heirs at law of the deceased, and that the deceased was the owner of the lands at the time of his death, subject to a mortgage which he had executed to the county of Holt, to secure a school debt. This mortgage covered the S. 1-2 of the N. W. 1-4 of Sec. 9, the other twenty acres not being included in the mortgage. The mortgage contained the statutory provisions, authorizing a sale by the sheriff, &c., to pay the debt and interest.

The county court of Holt county made an order to foreclose the mortgage by ordering the sheriff to sell the lands for that purpose. But this order misdescribed the land given to secure the debt. The sheriff, nevertheless, some two years afterwards, proceeded to sell the mortgaged premises, and the defendant bought the same at sheriff's sale and took the sheriff's deed therefor. This deed does not show, that the land was sold at a session of the Circuit Court, but recites that the sale was made pursuant to an order of the County Court. The court excluded the deed as any defense or as proper evidence, and found the issues for the plaintiffs, and appointed commissioners to admeasure the dower. The commissioners set off to the defendant, as and for the widow's dower in the premises, the south-west quarter of the north-west quarter of said section 9, and the court entered final judgment confirming this report and ordering possession of the remainder of the lands to be surrendered to the plaintiffs as

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heirs at law of the deceased. The defendant saved exceptions to the several rulings of the court during the progress of the trial, and by motion for a new trial, &c.

The only material point raised by the record, is the action of the court in excluding the mortgage to the County of Holt and the sheriff's deed to the defendant, under the foreclosure sale. The order of the County Court to foreclose the mortgage did not truly recite the debt, so as to sufficiently identify the mortgage. But the sheriff proceeded as though the order was sufficient and sold the mortgaged premises to the defendant. If the money raised by this sale was paid to the county, as we must presume it was, it extinguished the debt due to the county, or more properly speaking, it transferred the rights of the county to the defendant. He thereby became in equity entitled to the mortgaged debt.

If the proceedings to foreclose the mortgage had been regularly made under a proper order, the legal title would have passed to the defendant. As this was not the case, he could only use the forfeited mortgages to protect him in the possession of the mortgaged premises. As he ought to be substituted to the rights of the county by virtue of the payment of its debt, he does not occupy the relation of a stranger to the mortgage, who has no right to set up a forfeited mortgage to prevent a recovery of the possession by the mortgagor or his heirs. This doctrine was maintained by this court in *Jackson vs. Magruder*, (51 Mo., 55,) and afterwards re-asserted in *Jones vs. Mack*, (53 Mo., 147,) and it may now be considered as the settled law of this State. The court therefore, erred in excluding the mortgage and proceedings of foreclosure.

The defendant is entitled, not only to hold possession of the dower estate as admeasured, but also the balance of the south half of the N. W. quarter of Sec. 9, which was covered by the mortgage.

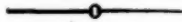
Of course the heirs at any time may redeem the mortgaged premises, and until so redeemed, the defendant must account for the rents and profits, to go toward satisfaction of the mortgage debt. The possession of the remainder of the land not

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covered by the mortgage or dower, or admeasured, was properly ordered to be delivered to the plaintiffs, and the judgment of the court below must be modified accordingly.

The judgment will therefore be reversed and the cause remanded, with directions to modify the judgment as herein directed.

Reversed and remanded; Judge Vories not sitting. The other judges concur, except Judge Sherwood dissenting.



SOPHIA KARLE, Respondent, *vs.* THE KANSAS CITY, ST. JOSEPH AND COUNCIL BLUFFS R. R. COMPANY, Appellant.

1. *Practice, civil—Objection that petition states matter of law—When not considered by Supreme Court.*—The objection that plaintiff's petition sets up matters of law will not be considered by the Supreme Court, when not raised in the trial court by instructions, motion to strike out, demurrer or answer.
2. *Instructions should be taken as a series.*—If, when taken together, instructions are correct and not calculated to mislead, they are properly granted.
3. *Damages—Railroads—Contributory negligence of deceased—Legal effect of.*—In suit against a railroad company by the wife for the killing of her husband, under the Damage Act (Wagn. Stat., 619), if deceased was guilty of any negligence which contributed directly to cause his death, plaintiff cannot recover.
4. *Damages—Railroads—Violation of ordinance as to speed, ringing of bells, etc.*—Where a city ordinance, duly authorized by law, expressly requires railroad trains while passing through the city limits, to observe a certain rate of speed, to keep head-lights burning, and the bell ringing, failure to comply with such ordinance amounts to negligence, *per se*. But these violations do not fasten liability on the company, where they did not cause the damage.
5. *Railroads—Trains—Running of at unusual hours—Precautions—What necessary.*—Where a train is run through a populous city at an unusual hour, it is incumbent on its employes to take unusual precautions to avoid accidents, and the failure to do so would authorize a jury to infer negligence.
6. *Railroads—Damages—Exercise of proper care by company—When necessary—Contributory negligence.*—Mere carelessness on the part of the injured person will not excuse a railroad company, if by the exercise of proper care and prudence and the rules and regulations prescribed by law, the injury could have been avoided.

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Stringfellow, for Appellant.

Hill & Carter, for Respondent.

Unless the acts of the person killed were the direct and proximate cause of the disaster, the company will not be excused from liability. (*Kennayde vs. Pacific Railroad*, 45 Mo., 253; *Colegrove vs. N. Y. & H. R. R. R.*, 6 Duer., 382; *Shearm. & Redf. Neg.*, 25, 28, 29, 47, and cases cited; *Morrissey vs. Wiggins Ferry Co.*, 43 Mo., 380; *Davies vs. Mann*, 10 Mees. & W., 545; *State vs. Manchester & L. R. R.*, 52 N. H., 528; *Thompson vs. N. Mo. R. R. Co.*, 51 Mo., 190; *Meyer vs. People's R. R. Co.*, 43 Mo., 523.)

NAPTON, Judge, delivered the opinion of the court.

This suit was to recover the penalty of \$5,000 against defendant for killing the plaintiff's husband at a street crossing in St. Joseph, by the careless and negligent conduct of an engineer in charge of a locomotive of defendant.

There was a verdict for plaintiff under instructions from the court; and a bill of exceptions was taken, which did not give any details of the evidence on either side, but merely stated that evidence was given to sustain the issues made by the pleadings on either side. The instructions given and refused are preserved in the bill of exceptions, and the propriety of these instructions presents the only point for our consideration.

The instructions given, are as follows:

1. The defendant admits that it is a corporation, &c., and the owner of a certain railroad from Kansas City to and through the City of St. Joseph, &c., and that it was authorized to run locomotive engines, cars, &c., over and across the roads and streets of said City of St. Joseph, &c.; also admits, that the City of St. Joseph was incorporated, &c., and that by an act of the General Assembly of the State of Missouri entitled, "An act to amend the charter of the City of St. Joseph, approved Jan'y 26, 1864," power and authority were granted to said City of St. Joseph to prescribe the kind of power to be used

on said road, and to regulate the speed of locomotives and cars passing over said railroad within the corporate limits of said city; and that in pursuance of said power and authority thereby granted the said city, it duly passed, on the 12th of June, 1869, an ordinance and law to regulate the same, and defendant admits that a portion of said ordinance and law pertaining to railroads is in words and figures as follows, to-wit: Ch. 47, §1. "No locomotive engine, railroad passenger car or freight car shall be driven, propelled or run upon or along any rail track within said city at a greater speed than at the rate of five miles per hour. Sec. 4. Every locomotive engine, railroad car, or train of cars running in the night time on any railroad track in said city, shall have and keep while so running, a brilliant and conspicuous light on the forward end of such locomotive engine, car, or train of cars. Sec 6. The bell of such locomotive shall be rung continually while running within said city."

Defendant also admits, that said ordinance and law and the parts thereof above set forth, were in full force and effect in said City of St. Joseph at the time of the alleged committing of the injuries and violations in plaintiff's petition complained of.

2. The court instructs the jury, that if they believe from the evidence that G. Karl, husband of the plaintiff, was by the defendant's locomotive and tender run over and killed while crossing the said defendant's railroad at the crossing of 8th St., in the City of St. Joseph; and said running over and killing were the result of, and occasioned by, the negligence or unskillfulness of the servants, engineer or employes of the defendant conducting or managing said locomotive and tender, they will find for the plaintiff \$5,000 in damages.

3. If the jury believe from the evidence, that the defendant at the time alleged in the petition, by its servants and employes ran their locomotive engine along its railroad track within the City of St. Joseph, at a greater speed than the rate of five miles per hour, it constituted negligence on the part of the defendant.

4. If they believe from the evidence, that the defendant at the time alleged in the petition, by its servants or employes, ran their locomotive engine, car or train of cars in the night time on its railroad track in the City of St. Joseph, without keeping while so running a brilliant and conspicuous light on the forward end of such locomotive engine, car or train of cars, it constituted negligence on the part of defendant.

5. If the jury believe from the evidence, that the defendant at the time alleged in the petition, by its employes ran its locomotive engine over its road within the City of St. Joseph, without ringing its bell continually while running in said city, it constituted negligence on the part of the defendant.

6. The court instructs the jury, that they are authorized to infer negligence upon the part of defendant, if they believe from the evidence, that the defendant at the time alleged in the petition, by its servants and employes ran its locomotive or train within the City of St. Joseph, out of the usual time for running its trains over its railroad, and failed to use more than ordinary care when crossing the streets or public highways in said city to avoid doing injury to persons passing over its track.

The above instructions were all given against the objection of defendant. The defendant asked the following instructions: *plaintiff must prove.*

First. In this case, the burden of proof is on the plaintiff, and to entitle her to recover she must prove to the satisfaction of the jury by the preponderance of the evidence, - 1st, that the husband of plaintiff was killed by the negligence, unskillfulness or criminal intent of some officer, agent, servant or employee of the defendant; 2nd, that such officer, agent, servant or employee was at the time running, conducting or managing some locomotive of defendant; 3rd, that such servant, agent, officer or employee was at the time subject to and under the control of defendant; 4th, that such person so killed had a right to be on defendant's road at the time and place where he was killed.) And if the plaintiff fail to satisfy the jury of all or any one of these facts, they will find for defendant.

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Second. If the jury find from the evidence, that the death of Karle, was occasioned in any manner by his own negligence, or that at the time of his death he failed to use ordinary care to protect himself from danger, by reason of the passing of defendant's train, they should find for defendant.

These instructions were refused, and the court instructed as follows:

The court instructs the jury, that the burden of proof is on the plaintiff; and to enable her to recover, she must prove to the satisfaction of the jury by the preponderance of the evidence, 1st, that the husband of plaintiff was killed by the negligence, unskillfulness or criminal intent of some officer, agent, servant or employee of defendant; 2nd, that such officer, servant, agent or employee was at the time running, conducting or managing some locomotive of defendant; 3rd, that said person so killed was in a public street crossing in the City of St. Joseph at the time of such killing. And if the plaintiff fails to satisfy the jury of all or any one of these facts, they will find for defendant.

Third. The court instructs the jury, that if they find from the evidence that the deceased Karle, was guilty of any negligence that contributed directly to cause his death, they will find for the defendant.

The first instruction is simply a repetition of the allegations of the petition which were not answered, and which therefore, under our rules of pleading, must be taken as admitted.

It is urged now, that the allegations in the petition thus recited in the first instruction, averred matters of law as well as fact, and therefore the failure to answer them only admitted the matters of fact alleged, and not the matters of law asserted; that the ordinance of the city was, so far as it required a head-light not authorized by its charter, and that the charter of the city could not, if its provisions so purported, affect or invalidate the privileges and rights of the railroad company under its charter, and the general law of the State regulating this and other roads.

It was the province of the court to instruct the jury on mat-

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ters of law, and if the first instruction be assumed as a declaration on the part of the court, not only that the charter of the City of St. Joseph was as stated, but that it was a legal and valid charter, and that the ordinance recited was not only in point of fact passed, but was valid and operative at the time of the alleged injury, we are unable to see how the validity of the charter or of the ordinance was disputed in the court that tried the case. No instructions on this point were asked by the defendant; no motion was made to strike out, nor any demurrer offered to these allegations of the petition as containing matters of law, and no answer was made to them.

It is said here, that the charter only authorized the city authorities to regulate the speed of the transit of trains through the city, and control the motive power used; and gave the city no power to require head-lights and a continued ringing of bells when running at night. This point is not presented to the Circuit Court, nor is it probable that the court designed to pass on it by simply reciting in an instruction to the jury the allegations in the petition not denied in the answer. There are very few allegations of fact contained in any petition which do not in some sense impliedly assert what may be called matters of law, and it is difficult for a court in its instructions to juries to avoid such assumptions, practically not calculated to mislead any one. It is easy to call the attention of a court to serious departures from the rule which requires questions of fact only to be submitted to a jury.

It may be that the general statutes concerning railroads required head-lights on a locomotive engine when running through any city or town and the ringing of bells, or that other provisions in the charter of the City of St. Joseph authorized such regulations in relation to the police of the city as would warrant the restrictions complained of here. But it is obvious that the important points decided by the court in its instructions at the trial, and properly before this court for review, relate altogether to the question of negligence on the part of the defendant, and negligence on the part of the plaintiff's husband.

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The objection to the first instruction given by the court at the instance of the plaintiff in regard to negligence is, that it ignored the subject of negligence by the plaintiff's husband altogether and therefore authorized the jury to find a verdict for plaintiff on proof of the negligence or carelessness of defendant's agents, without regard to the proof of any degree of negligence by the person killed.

The instructions given by the court whether for plaintiff, or defendant, or upon the court's own motion, must be regarded together; and if as a whole series of instructions they are correct and not calculated to mislead, a mere conclusion based on the ground that they are not all embraced in a single instruction cannot avail the plaintiff in error as a ground for reversal. Where there are several issues and evidence is offered on each, a general instruction applicable to the whole case might be so complex as to be more likely to mislead or perplex a jury than a series of instructions on each issue presented by the pleadings and evidence. In this case we know nothing of the evidence given on the trial, as it is not preserved by the bill of exceptions. It is merely stated, that evidence was "introduced by the plaintiff to sustain the issues on her part, and the defendant introduced evidence to sustain the issues on its part, and this was all the evidence in the case." As the plaintiff averred that the killing was done by the negligence of defendant, without any negligence or fault of plaintiff's husband, and the defendant denied these allegations, the question of negligence on the part of the deceased husband of plaintiff was in issue, and we may assume that there was evidence on this issue, and therefore the court was properly required to instruct on this point. The instruction given by the court on this subject, was, that if the jury found that the deceased was guilty of any negligence that contributed directly to cause his death, they would find for the defendant. This instruction is unquestionably in conformity to the well settled doctrines of this State, however it may be regarded elsewhere.

This subject has been carefully examined, and the leading au-

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thorities both in England and this country thoroughly reviewed and considered in a number of cases decided by this court. (Brown vs. Han. & St. Jo. R. R., 50 Mo., 461; Walsh vs. Mississippi Trans. Co., 52 Mo., 434; Morrissey vs. Wiggins Ferry Co., 43 Mo., 380; Kennayde vs. Pac. R. R. Co., 45 Mo., 255.) It is unnecessary to discuss the question again. The question of negligence is treated here as a mixed question of law and fact, the facts being left to a jury, and the legal effect of them declared by the court. Undoubtedly, negligence as a question of fact, must of necessity vary with the circumstances of each particular case. Hence, the instructions of the court will necessarily be adapted to the particular facts in testimony. The three instructions which declared a failure of the defendant to observe the regulations of the city ordinance in relation to the speed of trains, keeping head-lights and ringing the bell, to be negligence *per se*, were undoubtedly correct. These were violations of an express law and of course amounted to negligence. It does not follow, however, nor was the jury so instructed, that these violations of law, or any one of them made defendant liable; for in this as in the other instructions, the qualification announced in the first and principal instruction on negligence, that this negligence caused the injury, was necessarily implied; and so the first instruction, if regarded as stating the whole law of this case, manifestly implies that the cause of the injury was the negligence of the defendant and not the negligence of the deceased.

The sixth instruction given for the plaintiff was unnecessary and perhaps improper, if we assume that there was no evidence showing that the defendant's locomotive was running at an unusual or irregular time when the accident occurred, and there is no allegation in the petition to this effect. The instruction is undoubtedly the law. There can be no question that if the defendant was, on the night of the accident running a train through a populous city at an unusual hour, it was incumbent on its employees to use unusual precautions to avoid accidents, and the failure to use such precautions would certainly authorize a jury to infer negligence. This is a mere

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inference of fact, however, and it is not the duty of the court to tell the jury what particular inferences or conclusions they may be justified in drawing from a hypothetical state of facts. As we do not know that there was any evidence on this point and the bill of exceptions does not state that there was, (there being no such issue made in the pleadings) we presume this instruction was harmless, since as an abstract proposition it was right enough.

In regard to the defendant's instructions which were refused it will be apparent from an examination of them and those substituted by the court, that such of them as were proper were substantially given. The principal instruction given by the court in regard to the negligence of the person killed is substantially the one asked by the defendant on this point. The only variance is, that the instruction given uses the word "negligence," and the instruction asked used the term "want of ordinary care" which we take to be equivalent expressions. It is true the instruction given adds that this negligence or want of ordinary care must contribute to the result directly, and in this respect it was more favorable to the defendant than some of our decisions above referred to, and others referred to in the cases cited, would warrant. For it is held, that mere carelessness on the part of the injured person will not excuse the defendant, if by the exercise of proper care and prudence and the rules and regulations prescribed by law, such injury could have been avoided. The doctrine of contributory negligence is thus stated in the work of Shearman and Redfield Ch. 3, § 25. "One who is injured by the mere negligence of another, cannot recover at law or in equity any compensation for his injury, if he by his own or his agent's ordinary negligence or willful wrong, proximately contributed to produce the injury of which he complains, so that but for his concurring and co-operating fault, the injury would not have happened to him, except where the more proximate cause of the injury is the omission of the other party, after becoming aware of the danger to which the former party is exposed, to use a proper degree of care to avoid injuring him." And

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this is substantially the doctrine of this court in *Morrissey vs. Wiggins Ferry Co.*, 43 Mo., 380.

Upon the whole we think the instructions were correct and therefore the judgment will be affirmed.

The other judges concur.

—o—

ISAAC WYATT Appellant, vs. THE CITIZENS RAILWAY COMPANY
Respondent.

Damages—Street railroads—Jumping from platform—Negligence—Jury.—

In suit for damages against a Street Railway Company, where it appeared that a lad of seventeen years, and of sound mind, jumped or stepped from the car while in rapid motion, it was held improper to instruct the jury, that such action *per se* constituted negligence in law on the part of the boy. The question of negligence in such case should be left to the jury.

Appeal from Buchanan Circuit Court.

Ringo & Masterson, for Appellant.

The second instruction given for respondent was wrong. The question of negligence in this case was for the jury.

Where the facts are not perfectly clear, as in the case at bar, the whole matter should be submitted to the jury under proper instructions.

The jury should determine whether, notwithstanding the imprudence of the injured person, the defendant could not in the exercise of reasonable diligence have prevented the catastrophe. (*Huelsencamp vs. Citizens Railway*, 37 Mo., 537; *Morrissey vs. Wiggins Ferry Co.*, 43 Mo., 380; *Id.*, 47 Mo., 521; *O'Flaherty vs. Union R. R. Co.*, 45 Mo., 70; *Brown vs. H. & St. J. R. R. Co.*, 50 Mo., 461; *Walsh vs. Miss. Val. Transp. Co.*, 52 Mo., 434; *Trow vs. Ver. Cent. R. R.*, 24 Ver., 487; *Lovett vs. Salem & S. D. R. R. Co.*, 9 Allen, 557; *Owen vs. Hudson River R. R. Co.*, 2 Bosw., 374; *Maccon & W. R. R. Co. vs. Davis' Admr.*, 18 Ga., 679; *Id. vs. Wynn*, 19 Ga., 440; *Ang. & Sav. R. R. vs. McElmurry*, 24 Ga.,

75; New Haven Steam Bt. Co., vs. Vanderbilt, 16 Conn., 421; Birge vs. Gardiner, 19 Conn., 507; Kerwhacker vs. C. C. & C. R. R. Co., 3 Ohio St., 172; 2 Redf. Railw., 225-236; Runyon vs. Cen. R. R., 1 Dutch., 556; Central Railway & Banking Co. vs. Davis, 19 Ga., 437; Bird vs. Holbrook, 4 Bing., 628.)

It made no difference under that instruction what degree of negligence, carelessness, recklessness or misconduct the respondent might have been guilty of, in the management of its car, at the time appellant's son sustained the injury complained of, if appellant's son "was seventeen years old" and "possessed of ordinary mental capacity," and "was not an idiot" nor "an insane person." The finding of those specified and isolated facts by the jury, was sufficient to excuse the respondent in any line of conduct which it might choose to adopt and pursue in reference to a plain and indispensable duty. It was utterly impossible for this instruction to do otherwise than confuse and mislead the jury. (Mead vs. Brotherton, 30 Mo., 201; Kennedy vs. N. Mo. R. R. Co., 36 Mo., 351; Meyer vs. Pacific R. R. Co., 40 Mo., 151; 45 Mo., 137; Rose vs. Spies, 44 Mo., 20; 1st Nat. Bk. vs. Currie, 44 Mo., 91.)

"It would be manifestly unjust to characterize as negligence the act of yielding obedience to the requirements of the party inflicting the injury, and to hold as between the parties themselves, that it should deprive the party injured of all legal redress." (McIntire vs. N. Y. Cent. R. R. Co., 37 N. Y., 287; the same doctrine is maintained in Penn. R. R. Co. vs. McCloskey's Admr., 23 Penn., St. 526.)

A. H. Vories, for Respondent.

I. The second instruction given for respondent did not take the case or facts from the jury, but left the jury to find specific facts, and if so found, then to declare that they amounted to such contributory negligence and want of ordinary care, that the verdict must be for defendant. (Redf. Railw., §§ 150, 330, 336; Shearm. & Redf. Neg., §§ 43, 46, 62, 64; Gin-

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non vs. N. Y. & H. R. R. Co., 3 Robertson, 25; R. R. Co., vs. Aspell, 23 Penn. St., 147, 150; Damont vs. New Orleans & C. R. R., 9 La., [An.] 144; Boland vs. Mo. R. R. Co., 36 Mo., 448; O'Flaherty vs. Union R. R. Co., 45 Mo., 70; Barton vs. St. Louis & I. M. R. R. Co., 52 Mo., 253; Ch. & A. R. Co. vs. Randolph, 53 Ill., 510; Brown vs. Eur. & North. Am. Railw. Co., 58 Me., 384; Callahan vs. Bean, 9 Allen, 401; Lovett vs. Salem & S. D. R. Co., *Id.*, 557; Porter vs. Harrison, 52 Mo., 524.)

NAPTON, Judge, delivered the opinion of the court.

The only question in this case is the propriety of the instructions given. The evidence is not preserved. The bill of exceptions merely states, that there was evidence by the plaintiff to prove the issues on his side, and by the defendant to disprove them. The defendant is proprietor of a street railway in the City of St. Joseph. The petition charges that the plaintiff's son, about 17 years old, took passage on the car destined for the crossing of 6th street, at or near the "Oregon House" on 6th street; that this was a point at which it was customary for defendant's car to stop, when a passenger so desired, and that it was its duty so to do; that the plaintiff's son, when he arrived at his point of destination, at the Oregon House on 6th street, and at a regular crossing of said street, requested and demanded of the conductor of defendant's car, to stop said car, so that the said plaintiff's son could get out; but that the conductor, carelessly, negligently, willfully and maliciously refused to stop said car, so that said Wyatt could get out, and at the same time recklessly, negligently, &c., well knowing the danger thereof, ordered him to jump from said car, while it was in rapid motion; that thereupon said Wyatt, the minor son of plaintiff, in obedience to the order of defendant's conductor, and after having repeatedly requested and demanded that said car should be stopped as aforesaid, after said request had been repeatedly refused as aforesaid, and it being imperatively necessary for said Wyatt to stop at the point aforesaid, &c., stepped or jumped from said car, using

as much care and prudence as he could possibly command. It is further charged, that in consequence of this negligence, &c., on the part of defendant, said plaintiff's son was thrown upon his right knee, and so injured and bruised, &c., that amputation became necessary, &c. The answer denies these allegations and sets up new matter which it is unnecessary to notice.

The principal point in this case is presented by the 2nd instruction given for the defendant. That instruction is: "If the jury believe from the evidence that at the time said Benj. Wyatt received the alleged injuries, arising from his jumping from the car of the defendant, whilst it was in rapid motion, he was a young man or boy of the age of 17 years or over, and was possessed at said time of ordinary mental capacity, being neither an infant of tender years, an idiot, or insane person, then under the pleadings and evidence in this case the plaintiff cannot recover, and the jury will find for the defendant."

This instruction was virtually a direction to the jury to find for the defendant, since the facts that the boy was 17 years old, and that he was of sound mind, were not disputed. The instruction declares as a matter of law, that if a young man 17 years old steps or jumps from a street car when in rapid motion, it is *per se* negligence, no matter under what circumstances it may have occurred.

It is obvious, that in regarding negligence as a question of fact, the circumstances under which the alleged negligence occurs will materially affect the question. The character of the vehicle from which a passenger alights, is one circumstance which would very much influence one's opinion, as to the prudence or want of prudence of the act; and many other circumstances, under which a person might jump from a carriage drawn by horses, or a car on a railroad drawn by horses, or a car drawn by a locomotive engine propelled by steam, would determine the propriety or prudence of the act. There may be alternatives presented, and a momentary decision required, in cases where the event only shows the wisdom

or folly of the sudden resolution and act; and certainly there is a manifest distinction between railroad cars drawn by horses or other animals, and those propelled by steam engines. What might be well termed rapid motion of the former, would be a very low rate of speed in the latter, and the construction of the cars in street railroads, is essentially different from that of those drawn by locomotive steam engines, so far as the facilities and safety of jumping or stepping from the one or the other is concerned. What would be extreme recklessness in jumping from a car on a railroad, where steam was the propelling power, might be fully justified as proper and prudent in escaping from a car drawn by horses. However this may be, it will at all events be clear, that in considering the question of contributory negligence, the facts and circumstances must necessarily be left to a jury. There is no doubt that ordinarily, the question of negligence is a mixed question of law and fact, and when it is practicable, the court will pass upon the facts. Thus in the case of *Karle vs. The K. C., St. Joe. & B. R. ante p. 476*, a breach on the part of the company of positive requirements of law, may well be pronounced by the court to be negligence. And so in the case of *R. R. Co. vs. Aspell*, (23 Penn., St., 147,) where the plaintiff leaped from a train of cars in the dark, against the remonstrances of the conductor, and under repeated assurances that the train would be stopped for him in time to get off, the court pronounced such act as pure recklessness, for which the company was not responsible. And so in the case of *Boland vs. Missouri R. R. Co.*, (36 Mo., 448,) where an infant only two years old was killed by being run over by a street car, but the driver of the car, driving slowly and cautiously, had his attention directed in another direction, and knew nothing of the approach of the child, and stopped the car as soon as he was warned of its approach; the court held there was no negligence as a matter of law on the facts in evidence. And so in this case, if the facts stated in the instructions, that the boy was 17 years old and was of sound mind, and jumped from the cars when in rapid motion, constituted negligence in law, without regard to the

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other circumstances averred in the petition, and to prove which, we must assume there was evidence, the instruction would be right. But we are not disposed to pronounce such act negligence as a matter of law. The circumstances might justify the act, and it was for the jury to consider these circumstances and determine, whether under the circumstances, the plaintiff acted with ordinary care and prudence as was said by the court in *Filer vs. N. Y. Central R. R. Co.*, (49 N. Y. 47.) "That there was more hazard in leaving a car in motion although moving ever so slowly, than when it is at rest, is self-evident. But whether it is imprudent and careless to make the attempt, depends on circumstances, and where a party, by the wrongful act of another, has been placed in circumstances, calling for an election, between leaving the cars or submitting to an inconvenience and a further wrong, it is a proper question for the jury, whether it was a prudent and ordinarily careful act, or whether it was a rash and reckless exposure of the person to peril and hazard." This was a case where a passenger had taken a ticket for a point on a railroad where the train ordinarily stopped, and was advertised to stop, and on approaching the place, the brakeman called out the name of the place, and the speed of the cars was reduced, and the plaintiff was told to get off, notwithstanding the cars were still in motion, and in attempting to do so, she was injured. The court laid considerable stress on the advice of the defendant's agent to the plaintiff to get off, and on the necessity of her deciding promptly on what she would do, and a verdict, of the jury on the question of negligence was sustained. And in *McIntyre vs. Central R. R. Co.*, (37 N. Y., 287,) it was held not to be negligence for a passenger to follow the directions of a conductor of cars, and pass from one car to another, in a dark and stormy night and over a slippery platform; and whether this was negligence contributory to the injury received or not, was left to the jury.

And these are cases of accidents or injuries, occurring on cars drawn by locomotive engines. Nor is the doctrine of the court in *R. R. Co. vs. Aspell*, (heretofore referred to) at all

inconsistent with these positions. The language of Judge Black in that case is strong and pertinent, to the point, and may be readily assented to. He says, "persons to whom the management of a railroad is entrusted, are bound to exercise the strictest vigilance; they must carry the passengers to their respective places of destination, and set them down safely, if human care and foresight can do it; they are responsible for every injury caused by defects in the road, the cars or the engines, or by any species of negligence, however slight, which they or their agents may be guilty of, but they are answerable only for the direct and immediate consequences of errors committed by themselves. They are not insurers against the perils to which a passenger may expose himself by his own rashness and folly." Therefore, the conclusion of the learned judge was, that if a passenger on a railroad was foolhardy enough to jump from the train on a dark night, when it was in motion, and despite of the assurances of the officers that it would stop at the place he desired to get off, it was mere recklessness and was at his own risk. But the case under consideration, is essentially different, and shows the impossibility of pronouncing on negligence as a matter of law, where it must be determined by a complication of circumstances, more readily, and indeed only to be appreciated by a jury. Whether it would be safe or prudent for a young man of seventeen, to alight from a street car, going at the rate of four or five miles an hour, which may be assumed as the maximum speed of ordinary draft horses on a trot, is a question proper to be submitted to a jury; and whether the refusal of the conductor to stop at the point where the boy wished to stop, and his order to jump, might not have prompted the boy to a precipitate and unwise determination, and thus relieved him of any imputation of rashness and recklessness, seem to be appropriate questions of fact for the determination of a jury. A review of the decisions of this court on this subject, which of late years have been numerous, would only show that each case depended very much on its own peculiar facts. "It is one thing" Judge Woodward observed, in the Penn. R. R. Co.,

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vs. Kilgore, (32 Penn. St., 292,) "to define a principle of law, and a very different matter to apply it well; the rights and duties of parties grow out of the circumstances in which they are placed." Hence, the great variety of aspects in which the question of negligence is regarded by the courts, and the apparent inconsistency between many of the decided cases. In regard to the other instructions given in this case, enough has been said to show that they were mainly correct, and not calculated to mislead.

We will reverse the judgment, and remand the case. The other judges concur, Judge Vories not sitting

WILLIAM A. DONALDSON, Respondent, vs. HENRY HIBNER,
Appellant.

1. *Estoppel in pais does not affect subsequently acquired title.*—In ejectment for certain lands bought by defendant at a sheriff's sale, plaintiff will not be estopped from setting up an adverse title, by reason of the fact that at the sale, not then having any title in himself, plaintiff induced defendant to purchase by his representations that a good title would pass by the sale. Acts of *estoppel in pais*, operate only upon existing rights, and do not affect a subsequently acquired title.

Appeal from Ray Circuit Court.

Thomas I. Dent and George W. Dunn, for Appellant.

William A. Low, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action of ejectment, commenced in the Common Pleas Court of Caldwell county, for a tract of land in that county, and taken by change of venue to the Ray Circuit Court, where the case was tried and resulted in a judgment in favor of the plaintiff.

Both parties claimed title under one William H. Keitesson as the common source. The plaintiff showed a regular deed of conveyance from Keitesson to himself. The defendant stood upon a sheriff's deed made on a sale of the land under an

execution which had been issued on a personal judgment, rendered against Keitesson without service of summons, and without any appearance, and purporting to be based on an order of publication in a personal action; and in connection with his sheriff's deed the defendant relied upon the fact that the plaintiff was an attorney at law and procured the judgment referred to, and was at the sale made by the sheriff, and proclaimed to the bidders that the judgment and proceedings were regular, and a good title would pass by the sale; and that defendant acted on those declarations, believing them to be true, and made his purchase at sheriff's sale, and took the sheriff's deed. It was after this sheriff's sale and deed to the defendant, that the plaintiff made his purchase and took his conveyance from Keitesson.

The only point made and relied on, is that the plaintiff is estopped from setting up the title conveyed to him by Keitesson, as against the defendant. It is contended, that the acts of the plaintiff amounted to an estoppel *in pais*. An estoppel *in pais*, acts on existing rights. If the plaintiff had been invested with the title at the time the defendant bought under the void judgment and execution, his mouth would be closed from disputing the defendant's title, by setting up his own title, which existed at the time. But he had no title upon which the alleged estoppel could act. Keitesson held the only title to the land at that time, and as the judgment and sale under it are conceded to be void, his title was not impaired or in any manner affected by such sale. Being the owner of the land, he held it with all its incidents. As owner, he had the right to sell and transfer the land to any person capable of making the purchase.

Notwithstanding the conduct of the plaintiff at the sheriff's sale, he was not incapacitated from subsequently acquiring the title to this land from Keitesson. There is nothing in the doctrine of estoppel *in pais*, to justify the conclusion that it passes a subsequently acquired title.

We can act only on existing, and not subsequently acquired rights.

Judgment affirmed. All the other judges concur.

SARAH G. TOTTEN, Respondent, vs. SAMUEL JAMES, Appellant.

1. *Evidence—Conveyances, certified copies of—Record, over fifty years old—Military bounty lands—Statute, construction of.*—Though it might be questionable, whether the certified copy of a conveyance of military bounty lands recorded over fifty years before was admissible in evidence under the statute (Wagn. Stat., 595, §§ 35, 36) without further proof; yet it would be clearly admissible under the Act of March 22nd, 1873 (passed since the trial in this case), and therefore this court will not reverse the case on account of such admission, but adjudge the costs of the appeal against the party who offered the deed in evidence.
2. *Ejectment—Outstanding title—Limitations, statute of.*—An outstanding title is not admissible in evidence in favor of the defendant in an ejectment suit, when it is barred against the plaintiff by the Statute of Limitations. (McDonald vs. Schneider, 27 Mo., 405, affirmed.)

Appeal from Carroll Circuit Court.

Ray & Ray, for Appellant.

I. The certified copy of the record of the deed from Whitehead to Snell was not admissible in evidence, because the original of said deed did not appear to have been properly acknowledged under our laws or the laws of Kentucky, when made, nor was any proof of its execution offered, nor was any proof offered to show what were the laws of Kentucky at that time in reference to the acknowledgment of deeds. (Crispen vs. Hannavan, 50 Mo., 415; 1 Greenl. Ev., 183, § 142, 6 Ed.) Such certified copy was not admissible under Wagn Stat., 594, 595; the law applicable to military bounty lands is different (Wagn. Stat., 278, 279.)

II. Any alteration of that law (Sess. Acts 1873, p. 44) since the date of the trial of this case below cannot have anything to do with the decision of this case. It has often been decided, that a rule of evidence frequently becomes a rule of property, and, when that is the case, no subsequent change of the law of evidence can or will be permitted to work a divestment of title, or be allowed to confer title where it did not exist before:

III. The deed from Snell to Gibson, by the certificate duly indorsed thereon, appeared to have been duly proven by an

attesting witness thereto before a competent officer, and it further appeared by the oath of the defendant, that said original of said deed was not within the power of said defendant, nor ever had been, and that he knew nothing about it. The record of said deed was therefore admissible. (Wagn. Stat., 274-276, §§ 9, 15, 16, 17, 18; *Id.* 277, 278.)

A party offering the copy of a deed pertaining to military bounty land is not bound to prove its loss or destruction, unless the deed so offered is claimed to be admissible by reason of its having been acknowledged or proved out of this State and in conformity to the laws of the State where the acknowledgment or proof purports to be taken. (Wagn Stat., 278, 279, §§ 35-38.)

This deed was proved up in this State before a competent officer. In such case and under such certificate of proof, the party offering is only bound to make oath, that the original is not within his power.

IV. As to outstanding title see *Gurno vs. Janis*, 6 Mo., 330; *McDonald vs. Schneider*, 27 Mo., 405; *Meyer vs. Campbell*, 12 Mo., 603; *Schulz vs. Lindell*, 30 Mo., 310; *Callaway vs. Fash*, 50 Mo., 420; *Boyd vs. Jones*, 49 Mo., 202.

L. H. Waters, for Respondent.

I. The certified copy of the record of the deed from Whitehead to Snell is admissible in evidence under Wagn. Stat., 595, § 33, as amended March 22d, 1873 (Laws 1873, p. 44). As the law stood when this cause was tried in the court below, the record offered, being of a deed for military bounty land, was not admissible. (*Ryder vs. Fash*, 50 Mo., 476; *Crispen vs. Hannavan*, *Id.*, 415.) Though error may have been committed by the court below on the then state of statutory law, yet if by subsequent legislation such change has been made in the then existing law, so that, if the judgment was reversed, the court below by virtue of the new statute would have to give the same judgment, this court will affirm. (*Pugh vs. McCormick*, 14 Wall., 361.)

II. The record of the deed from Snell to Gibson was prop-

erly excluded. The land in controversy was military bounty land, and the record was of a deed which purported to have been executed out of this State, and within the United States, and the loss or destruction of the original should have been proved. (Wagn. Stat., 270, § 38.) This deed was executed when it was "signed, sealed, and delivered." (Christy vs. Cavanagh, 45 Mo., 375; Barton vs. Murrain, 27 Mo., 240.) Deeds to military bounty lands, executed out of the State, are withdrawn from the statutory rules of evidence relating to conveyances in general. (Crispen vs. Hannavan, 50 Mo., 415.)

III. The outstanding title relied on by appellant was barred by the statute of limitation.

NAPTON, Judge, delivered the opinion of the court.

This was an ejectment by plaintiff to recover a tract of land in the Military Bounty Land District.

The plaintiff's title was based on a deed from one Whitehead to her ancestor, dated June 3, 1819, and recorded in Howard Co., Mo., Nov. 8, 1819.

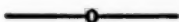
The defendant offered an outstanding title in one Gibson, depending on a deed made by plaintiff's ancestor, dated Jan'y 17, 1820, and recorded March 6, 1872. The only questions in the case are presented by the admission of the certified copy of the first deed, and the rejection of the certified copy of the second. The deed from Whitehead to Snell, plaintiff's ancestor, is clearly admissible under the 35th and 36th sections of the law concerning Evidence (Wagn. Stat., 595), since the legislative interpretation of these sections by the Act of March 22, 1873 (Sess. Acts of 1873, p. 44), and if there was any doubt about the propriety of its being received in evidence under the statutes as they were at the trial, it would be useless to send the case back, as it is certainly admissible now. This is only a question of costs.

The deed to Gibson was properly excluded. There was no proof of the loss or destruction of the deed (Barton vs. Murrain, 27 Mo., 240). Besides, it was offered as an outstand-

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ing title, and was barred as to the plaintiff by the Statute of Limitations. (McDonald vs. Schneider, 27 Mo., 405.)

The judgment is affirmed, but the costs of the appeal adjudged against plaintiff below. Judges Adams and Wagner absent.



OPINION OF THE COURT, IN RESPONSE TO THE RESOLUTION OF
THE GENERAL ASSEMBLY OF THE STATE OF MISSOURI.

1. *Constitution*—"Solemn occasion," etc.—*What is*—Each branch of State government to determine question for itself.—*Semble*, That what are "important questions of constitutional law," and what are "solemn occasions," (Art. VI, §11, State Const.) the framers of the Constitution intended each branch of the State government, to determine for itself.
2. *Constitution*—*Opinion of Supreme Court, cannot be given, when*.—The Court cannot under the State Constitution, (Art. VI, Supreme § 11,) give opinions on questions involving the interests of corporations or private persons, which may subsequently come before it in contested cases.
3. *Constitution*—*Proposed legislation*—*Effect of on State lien, etc.*—Questions relating to the effect of a proposed law upon a prior lien of the State, are not ones of constitutional law, but depend upon facts and principles of common law.
4. *Constitution*—*Extension of loan*—*Giving or loaning of credit*.—*Semble*, That an act of the legislature granting an extension of time upon a loan formerly made to a railroad company, is not in conflict with Art. XI, §14, State Const., which prohibits the giving or loaning of the State's credit, in aid of any person, association or corporation.

On February 27th, 1874, the House of Representatives of the 27th General Assembly, adopted the following resolution, to-wit:

"WHEREAS, One million five hundred thousand dollars of the indebtedness due by the Hannibal and St. Joseph R. R. Company, to the State of Missouri, matures during the present year, and, whereas, there has been introduced into this House, and referred to the Committee on Judiciary, a bill providing for an extension of twenty years time to said Railroad, on said indebtedness, by substituting a new series of bonds for the old ones, issued by the State to said R. R. Company, therefore,

Opinion of the Court given to the General Assembly.

Resolved, That the Judges of the Supreme Court of this State, are hereby requested to furnish to this House, at as early a day as possible their opinion, on the question: Whether such an extension of time on said indebtedness, would be a loaning or giving of the State's credit, as is contemplated by Sec. 13, of Article 11, of the Constitution of the State of Missouri? and also:

WHEREAS, The granting of such an extension of time to said R. R. Company on said bonds, would imperil the State's first mortgage lien on the property of said R. R. Company, by deferring it in point of priority to any other lien or claim now upon the property of said R. R. Company."

Which was read and adopted Feby. 9th., 1874.

J. T. PRATT, Chief Clerk.

In reply thereto, the Judges of the Supreme Court transmitted the following paper:

ST. JOSEPH, Feb. 23, 1874.

The Judges of the Supreme Court, are in receipt of a resolution of the House of Representatives, of the General Assembly of the State, requesting their opinion in regard to a proposed bill touching the guaranteed bonds of the Han. & St. Jo. R. R. Co., together with a copy of the proposed enactment, both of which have been forwarded by the Clerk of the House to the Clerk of this Court, at this place.

The questions propounded in the resolution, relate to the power of the legislature, under the 13th section of the 11th Article of our Constitution, to pass the proposed bill, giving an extension of 20 years to the company upon their indebtedness of fifteen hundred thousand dollars, for which the State holds a first lien on their property, and to the effect of such extension upon the rights of incumbrancers subsequent to the State.

The provision in our Constitution which requires the judges to give opinions, on "important questions of constitutional law" and on "solemn occasions" at the instance of the Governor or either branch of the General Assembly, is some-

what anomalous in its character, and couched in terms vague, indistinct and hardly susceptible of definite interpretation. What is a solemn occasion, or what may be regarded as an important question of constitutional law, are matters not easily defined; and the answers to these questions were perhaps, designed to be left to the legislative and executive departments of the government to determine for themselves, and to the Judicial Department to determine for itself; and such heretofore has been the practical construction of this provision.

On two former occasions this court has given opinions construing this 11th Section of the 6th Article, of the Constitution. (37 Mo., 135; 51 Mo., 586.) In both cases the court declined giving opinions upon questions involving the interests of corporations or private persons.

The House of Representatives will readily perceive the impropriety of a court in the last resort expressing, in advance, opinions upon points which may subsequently come before them in contested cases. Such opinions would be *ex parte*, without argument and without a due consideration of the facts, which might be material to a proper conclusion.

The questions propounded to the Judges mainly relate to the effect of the proposed law, upon the prior lien of the State, a question not of constitutional law at all, but depending altogether upon facts and principles of common law. We might readily conclude that the legislature has the power to grant the extension to the Han. & St. Jo. R. R. Co., if they thought proper to do so, and that the 14th Section of the 11th Article of the Constitution, which prohibits the credit of the State from being given or loaned in aid of any person, association or corporation, did not apply to a law which did not propose a loan or a gift, but simply an extension of time to a previous loan, and which might be necessary to secure the previous loan. But as the question embraces the right of incumbrances subsequent to that of the State, it is manifestly one which concerns others besides the State, and therefore is one upon which the court could not with any regard to the

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limitations of judicial power, express any opinion in advance of actual litigation.

The opinion given by the Judges recently, in relation to a proposed law to re-district the State into judicial circuits, was upon a question affecting no private or corporate interests, but a question of public policy alone. Where others are concerned beside the State they are entitled to be heard; and an opinion in advance of litigation would be a violation of the fundamental principle upon which all courts are based.

The Judges must therefore, with the highest respect for the House of Representatives, decline to answer the questions propounded.

[Signed]

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T. A. SHERWOOD,
DAVID WAGNER,
W. B. NAPTON,
H. M. VORIES,
WASH ADAMS.



JOHN H. WARE, Respondent, *vs.* WILLIAM JOHNSON, *et al.*,
Appellants.

1. *Sheriff's deed—Statutory power—Imperfect execution of, equity will not aid.*—A sheriff in the sale of land acts in the exercise of a statutory power and where his deed contains a false description, a court of equity will not aid the deed, and pass the title. The only remedy in such case is a proceeding to obtain a new deed in the court from whence the process issued.
2. *Land titles—Acts of ownership done bona fide—Possession—Trespass—Ejectment, etc.*—Where one does them in good faith, believing that he has valid title to certain land, acts such as, *e. g.*, cutting timber, etc., will constitute possession so that the real owner cannot maintain trespass, but must resort to his action in ejectment.
3. *Land titles—Title to a part of a tract—Cutting timber, etc., on remainder—Trespass.*—One having color of title to only a portion of a tract of timbered land, cannot take possession of the remainder by acts such as chopping fire-wood and saw logs and the like, so as to compel the owner to resort to his remedy by ejectment, but will be liable as a trespasser.
4. *Practice, civil—Demurrer—Answer waives.*—To bring an issue raised by demurrer before the Supreme Court, defendant must stand upon his pleading. By answering over he waives his demurrer.
5. *Trespass—Injunction.*—An action for trespass may embrace a prayer for injunction. (Wagn. Stat., 1029, § 4.)

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Appeal from Buchanan Common Pleas.

Vineyard & Chandler, for Appellants, presented the following among other points:

I. Plaintiff could not combine in one count trespass for cutting and carrying away timber, and an action in equity, to restrain defendant from further trespasses. (*Peyton vs. Rose*, 41 Mo., 257; *Jones vs. Moore*, 42 Mo., 413; *Henderson vs. Dickey*, 50 Mo., 160; *Curd vs. Lackland*, 43 Mo., 139.)

II. An action of trespass is one for injury to the possession; and plaintiff had none. He was endeavoring to test his title to land not in his possession by an action in trespass, which cannot be done. (*Cochran vs. Whitesides*, 34 Mo., 417; *Draper vs. Shoot*, 25 Mo., 197.)

III. Although the court might have regarded defendant's title as defective, still if possession was taken under it and held adversely to plaintiff, defendant ought to have been permitted to show the fact.

IV. The sheriff's deed ought to have been excluded. No surveyor, from the description contained in it, could tell where the land was.

Allen H. Vories, for Respondent.

I. Neither courts of equity nor courts of law can carry into effect the incomplete execution of statutory powers, nor reform sheriffs' deeds. (See *Moreau vs. Detchemendy*, 18 Mo., 522, 531; *Moreau vs. Branham*, 27 Mo., 351, 364; *Hubble vs. Vaughn*, 42 Mo., 138; *Abernathy vs. Denny*, 49 Mo., 468.)

II. There is no method known to the law by which his deed can be reformed, so as to make a good title to him; neither can evidence in aid of it be admitted. (See *King vs. Fink*, 51 Mo., 209, 212.)

III. Appellants answering over, cannot avail themselves of any grounds alleged in their demurrer as to insufficiency of pleadings. (See *Freeman vs. Camden*, 7 Mo., 298; *Wagn. Stat.*, 1036, § 19; *Pickering vs. Miss. V. & N. Y. C.* 47 Mo. 461.)

ADAMS, Judge, delivered the opinion of the court.

This was an action of trespass commenced in the Nodaway Circuit Court, and taken by change of venue to Buchanan county. The trespass complained of was for cutting timber on lot 2 of section 30, in township 65, of range 37, situated in Nodaway county, which the plaintiff alleged belonged to him. The defendants by their answer denied all the allegations of the petition, and alleged title in themselves to the land in dispute, under and by virtue of a sheriff's sale of the land as the property of Robert Russell. They alleged that the sheriff sold this identical land, but in his deed, by mistake, described the land as the north half of the west half of lot 2 of the south-west quarter of section 30, township 65, of range 37. They charge that the plaintiff took his title with full knowledge of the defendant's title and of the alleged mistake; and ask that the plaintiff be estopped from setting up claim to said land. That part of the answer, setting up the alleged mistake in the sheriff's deed, was on motion of the plaintiffs stricken out and the defendants excepted.

Both parties claim title under Robert R. Russell as the common source of title, and the evidence proved that Russell held the legal title by regular conveyances from the patentees under the United States. The plaintiffs claimed title under a sheriff's deed on a sale made on the same judgment against Russell, under an execution subsequent to that under which the defendants claim. The evidence showed that section 30 referred to, was divided into 11 lots, numbered consecutively from 1 to 11, and that there was only one lot in the section, numbered 2. It was also in evidence, that the land was only valuable for the timber, and was subject to overflow, and not suitable for cultivation. The defendants in the progress of the trial offered to prove that they took possession of the land by using it in connection with their farm for fire wood, and cutting timber for saw logs, and that they took such possession under the sheriff's deed under which they claim, and held it up to the commencement of this suit. This evidence at the instance of the plaintiffs was excluded, and the

defendants excepted. The defendants also offered their sheriff's deed in evidence, and offered evidence to prove the alleged mistake in the same, which were excluded; and also raised the same points by way of instructions on the trial. The case resulted in a verdict and judgment for plaintiffs. The defendant filed a motion for a new trial, saving the same points excepted to on the trial, which motion was overruled, and they have appealed to this court.

1st. A sheriff, in sales of land on execution, acts in the exercise of powers conferred on him by statute. His authority to make a deed is derived from the statute, and no court except the court under whose process he acts, can supervise his proceedings. If he actually levies on a particular tract of land and sells the same as levied on, and by mistake falsely describes the land in his deed, he may, under the supervision of the court issuing the process, make a new deed which will as to parties and privies and all purchasers with notice, relate to the time of the sale, and pass the title from that time. If the sheriff who made the sale becomes incapacitated to make the new deed, our statute provides that it may be made by another sheriff, and these provisions of the statute must be pursued, and furnish the only remedy in such cases. It is a well settled principle, which needs no illustration or citation of authorities, that a court of equity cannot aid the imperfect execution of a statutory power. The court therefore committed no error in striking out that part of the defendant's answer, and in excluding the evidence, and refusing the instruction in regard to the alleged mistake in their sheriff's deed.

2nd. But their deed as made covered one-fourth of the land in dispute, and on that ground it was admissible to show title in them to that part of the land. The evidence does not disclose whether the timber was cut on the part covered by the defendants sheriff's deed or not, and therefore they had the right to introduce this deed as a defense to the alleged trespass, and the court erred in excluding it.

3rd. When a party has the legal title to land not in the actual occupancy of another, he is presumed to be in the possession so

as to maintain trespass against a wrong-doer. So a party may under a deed only giving color of title, take such possession as a tract of land may be capable of, as for instance he may claim title and use the tract of the land for fire wood, saw logs, and in every other way that an owner of timbered land unfenced, may in connection with his farm. And such possession will be held to be an actual possession, and if invaded, he may maintain trespass or forcible entry and detainer as the case may be: (Chapman vs. Templeton, 53 Mo., 463; Fitch vs. Gosser, 54 Mo., 267.) But a wrong-doer without color of title cannot take possession in that way. It can only be done by one acting in good faith, believing that he has a good title, and when he is so in possession in good faith, the real owner must resort to his action of ejectment or other possessory action, and cannot maintain trespass against the person in possession. The only color of title the defendant had to this land was the sheriff's deed for one-fourth of it. They might be held to be in possession of that fourth by the acts of ownership they offered in evidence, if such acts were committed on that fourth; but they had no right to claim possession of that part of the lot outside of their deed, simply by cutting timber on the land. As their deed stood they had no pretense of any title to that part of the lot, and their acts as committed thereon, were simply acts of trespass for which they would be liable to the plaintiffs.

4th. The plaintiff in his petition asked for an injunction restraining one of the defendants from cutting timber on the land, alleging that he was wholly insolvent and threatened to continue the trespass, and that the land was only valuable for its timber. The defendants demurred to the petition on this account, but the demurrer was overruled, and they afterwards answered and proceeded with the trial. As the defendants did not stand on the demurrer, this point is not properly before us. A bill of exceptions is not the proper way to present a point raised by demurrer. The defendant must stand on the demurrer, to bring the point before this court; by answering over the defendants waived their demurrer; but if the point were properly here, I think it was decided rightly.

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Our statute allows an injunction to protect the subject matter of litigation during the pending of the suit, and I can see no reason why it may not be claimed in the same petition. (See Sec. 4, 2 Wagn. Stat., 1029.)

Judgment reversed, and the cause remanded; Judge Vories not sitting. The other judges concur.

—o—

WILLIAM BROOKS, *et al.*, Appellants, *vs.* HIRAM R. JAMESON, *et al.*, Respondents.

1. *Agents—Declarations of, when part of the res gestæ.*—Representations of an agent, at the time of making a sale as agent, are admissible in evidence as part of the *res gestæ*.
2. *Agency—How proved.*—The authority of an agent need not necessarily be proved by an express contract, but may be proved by the habit and course of business of the principal.
3. *Principal and agent—Third parties—Estoppel.*—If a man holds out another as his agent, and thus induces persons to deal with him as agent, the principal is estopped, as to such third parties, from denying the agency.

Appeal from Gentry Circuit Court.

Strong & Hedenburg, and Bennett Pike, for Appellants.

I. The taking of the notes in the names of the principals and in their business, without the continued possession of the same, or at least having the same in possession up to, and at the time of, payment, did not authorize said agents to collect the money due thereon by virtue of their agency. (Sto. Ag., 114, § 98; Doubleday vs. Krew, 60 Barb., 181.)

II. The said agents had the first two notes in their possession at the time of their collection of them. This, in connection with the fact of their having taken the same for their principals, raises a presumption of incidental authority in such agents to receive the money due on them. (Sto. Ag., 120, § 104.)

III. These agents were only special agents, and their declarations as to their authority did not determine the extent of such authority.

Chandler & Sherman, for Respondents.

I. The representations, declarations and conversations of plaintiffs' agents at the time of the sale of plaintiffs' machine to defendants, and respecting the transaction, constitute part of the *res gestæ*. (Sandford vs. Handy, 23 Wend., 260.)

II. The real question is not what power was intended to be given to the agents, but what power a third person, who dealt with the agents, had a right to infer from the acts of the agents and those of the principals. (Johnson vs. Jones, 4 Barb., 373; Perkins vs. Wash. Ins. Co., 4 Comst., 645; Comm'l Bank of Lake Erie vs. Morton, 1 Hill, 501; Tradesmen's Bank vs. Astor, 11 Wend., 87.)

III. It is not necessary in order to constitute a general agent, that he should have done an act the same in specie with that in question. If he has done things of the same general character and effect with the assent of his principal, that is enough. (Comm'l Bank of Lake Erie vs. Morton, *supra*; Perkins vs. Wash. Ins. Co. *supra*.)

IV. Persons dealing with agents, clothed with apparent authority by their principals, have the right to rely upon the acts and declarations of such agents respecting matters within the scope of their apparent authority, though they be limited in their agency, unless such persons knew of such limitations. (Howe Machine Co. vs. Snow, 32 Iowa, 433; Sumner vs. Saunders, 51 Mo., 89; Sto. Ag., §§ 137, 127, n. 2; Pickering vs. Buck, 15 East., 38; De Baun vs. Atchison, 14 Mo., 543.)

V. Ratification arises often by implication, and it is not necessary that there should be any positive or direct confirmation. Slight circumstances and small matters will sometimes suffice to raise a presumption of ratification. (Sto. Ag., §§ 252, 253, *et seq.*)

VORIES, Judge, delivered the opinion of the court.

This action was brought on an instrument described in the petition as a promissory note, which is in the following words:

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"CAMERON, Mo., Aug. 9th, 1869.

"On or before the first day of October, 1870, we promise to pay Upton Brown & Co. or order, two hundred dollars for value received in thresher, with interest at 7 per cent. payable at Cameron, Mo. The express condition of the sale and purchase of said thresher is such, that the title, ownership or possession does not pass from said Upton & Brown, until this note and interest is paid in full: that said Upton Brown & Co. have full power to declare this note due and take possession of said thresher at any time they may deem themselves insecure, even before the maturity of said note.

"For the purpose of obtaining credit, we certify that we own in our own name 300 acres of land, with 180 acres improved, worth over incumbrances, \$ — ; worth of personal property over and above all indebtedness \$ —."

The petition set out this note, and was otherwise in the usual form. The answer set up the allegation that the note had been fully paid when it became due, and prayed judgment for costs. The replication simply denied the payments.

At the trial it was admitted by the defendants, that plaintiffs composed the partnership firm of Upton Brown & Co., and the plaintiffs read the note in evidence and closed. The defendants were each examined as witnesses. Their evidence tended to prove, that, at the time of the execution of the note sued on, the defendants purchased at Cameron, Missouri, of the firm of Anter Bro's & Shutt, a thresher, for which they agreed to pay eight hundred dollars, two hundred dollars of which was paid down at the time of the purchase; and that they executed three promissory notes for two hundred dollars each, payable to plaintiffs, and delivered to said firm of Anter Bro's & Shutt, as plaintiffs' agents, for the balance of the purchase money; one of said notes being made payable in October, 1869; one on the 1st of January, 1870; and the third on the 1st of October, 1870; the third one being the same on which this suit is brought; that the said Anter Bro's & Shutt represented themselves to be the agents of plaintiffs in the sale of the machine and taking the notes,

and told the defendants, that when their notes fell due to come to them in Cameron, Mo., and pay off the notes; that the defendants paid off the first note about the time the same became due to Auter Bro's & Shutt, at Cameron, Mo., who then had said note in their possession, and when the note was paid, they delivered it up to defendants; that a short time before the second note became due, defendants paid a portion of it to Auter Bro's & Shutt, at Cameron, who said they would credit the amount so paid on said note; that said note was not exhibited at the time of said payment; that, afterwards, about the time the second note became due, they paid the balance due thereon in full to Auter Bro's & Shutt, at Cameron, who then had the note, and delivered it to defendants at the time of payment; that defendants, at the time of taking up the second note, paid to said Auter & Co. \$27 00, or \$35, to be credited on the note sued on, but that they did not see the note at the time, but took a receipt for such payment, signed by Auter Bro's & Shutt.

To all of the above evidence given by the defendants, the plaintiffs at the time objected, on the ground that said evidence was incompetent and not relevant to the cause. The court overruled the objection, and the plaintiffs excepted. The defendants introduced further evidence, tending to prove that, a short time after the second note executed for the machine had become due and had been paid, they received a letter from the plaintiffs, directing them to pay the same to Auter Bro's & Shutt, at Cameron, Mo., which was the only letter ever received by them from plaintiffs; that, about the time the note sued on became due, they went to Cameron to pay the balance due thereon, and paid the same to Auter Bro's & Shutt; that they did not present the note; that it was late in the evening when they called to pay it, and, when it was paid, they called for the note; one of the firm hunted for the note, another member of the firm expressed his doubts as to whether the note was there, and after the note had been hunted for unsuccessfully, they gave him a receipt for the money in full discharge of the note, Auter Bro's & Shutt, agreeing to send them the note when procured or found.

The depositions of plaintiffs, James Upton and Perry Upton, were then read in evidence, which tended to prove that the plaintiffs were partners in manufacturing threshing machines in the State of Michigan; that their business was exclusively carried on in Michigan, so far as the manufacture of machines was concerned; that they all reside in Michigan; that Auter Bro's & Shutt, a firm at Cameron, Mo., were their agents at Cameron for the sale of their machines, and as such agents possessed no authority except to sell the machines; that on the 29th of March, 1870, the plaintiffs received the note sued on from said firm at Cameron on the sale of one threshing machine; that on the 16th day of September, 1870, the note was forwarded by plaintiffs to the Cameron Deposit Bank for collection; that the note had remained in their possession from the time it was received up to the time they sent it to the bank; that said Auter Bro's & Shutt were never requested by plaintiffs to collect said note, nor did they ever have any authority to collect or receive any money thereon; that plaintiffs were always the owners and holders of the note; that plaintiffs did hold another note against defendants, which was due long before the note sued on, which at the request of the defendants was sent to Auter Bro's & Shutt for collection, but that no other note was ever sent to them for collection; that plaintiffs have never received any part of the money due upon said note; that no local agent of the plaintiffs is ever authorized to collect or receive the money upon any note or other obligation of plaintiffs, unless specially requested to do so in the particular case; that they are only authorized to receive the cash payment paid down at the sale of a machine. The defendants in rebuttal each testified, that neither of them ever requested plaintiffs to send the note or any note to Auter Bro's & Shutt for collection, nor had they ever any communication with plaintiffs of any nature whatever.

The court at the close of the evidence was requested by the plaintiffs to instruct the jury, as follows: 1st. "The pleadings in this case admit, that the defendants executed the

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note sued on in this case, and, if the jury believe from the evidence that they are the persons who composed the firm of Upton, Brown & Co. at the time said note was given, the jury will find for the plaintiffs, unless they further believe from the evidence, that defendants paid the full amount of said note to plaintiffs, or to some one authorized by plaintiffs to collect the same, before this suit was brought, and it devolves on the defendants to prove such payment."

This instruction was refused by the court in the form above written, but the court inserted in said instruction, immediately after the words therein "to collect the same" and before the words "before this suit," these words "or who the plaintiffs by their acts held out to defendants as being authorized so to collect said note." The court then gave the jury said instruction so modified. To the action of the court, in refusing the instruction as originally asked and in modifying the same, the plaintiffs at the time excepted.

The plaintiffs also asked the court to give the jury the following instruction: "It devolves on the defendants to prove to the satisfaction of the jury, that they paid said note to Auter Bro's & Shutt, and that they were authorized by plaintiffs to collect and receive the amount of said note, and, unless the defendants so prove, the jury will find for the plaintiffs." This last instruction was also modified by inserting in the appropriate place therein the same words inserted in the first instruction above set forth, and then given to the jury, to which the plaintiffs again excepted.

The court then of its own motion, and at the request of the defendants, instructed the jury as follows:

1st. "If the jury believe from the evidence, that the defendants purchased of plaintiffs, who then lived in Michigan, through their agents, Auter Bro's & Shutt, at Cameron, Mo., a machine, and at the time paid said agents a portion of the purchase money, and gave to the plaintiffs three notes for the remainder of the purchase money due and payable at future times, and that said Auter Bro's & Shutt were agents for that purpose, and that defendants or any of them paid off subse-

quently two of said notes, the two first falling due, to said agents at Cameron, Mo., at the request of said agents, and that plaintiffs at that time or subsequently, and before the payment of the note in suit, ratified the acts of said Auter Bro's & Shutt as their agents; and if the jury believe, that defendants or either of them, after such payment of the purchase money and of two notes, paid off in good faith to said Auter Bro's & Shutt, as agents as aforesaid of plaintiffs, the note sued on, believing at the time that said Auter Bro's & Shutt were such agents, and without any notice from plaintiffs that they were not such agents, then the jury must find for defendants."

2nd. "If the jury believe from the evidence, that the plaintiffs by their acts held out the idea to the defendants, that Auter Bro's & Shutt were their agents, and were authorized as such to collect the amount due on the note sued on, and that the defendants, in consequence of such inducement, paid in good faith the amount of such note to such agents, the jury will find for the defendants." There were other instructions asked for by the plaintiffs and refused by the court, but they do not involve any new point not involved in the modification of the instructions above set forth. The jury rendered a verdict in favor of the defendants. The plaintiffs filed a motion to set aside the verdict and for a new trial, assigning the usual causes therefor. This motion being overruled by the court, and final judgment rendered in favor of the defendants, the plaintiffs appealed to this court.

The first objection, raised on the record of this case to the action of the Circuit Court, is to the admission of the evidence on the part of the defendants which was objected to by the plaintiffs. The evidence was objected to, because it was immaterial and irrelevant. This evidence tended to prove what was said by the agents of the plaintiffs at the time the machine was sold and the note sued on was executed. It is shown by this evidence, that, at the time the machine was purchased and the note executed, and as a part of the transaction, the agents who sold the machine told the defendants that

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the notes could be paid to them in Cameron; that two of the notes were taken up from and paid to these agents, who had the notes in their possession at the times they respectively became due. This evidence was certainly admissible. There is no question but that these agents were authorized by plaintiffs to sell the machine; that fact is admitted by plaintiffs; their representations at the time of the sale then formed a part of the transaction, and were properly admissible in evidence, and when taken in connection with the fact, that the two first notes were found in their possession when due and paid to them, and with the further fact, that the notes were made payable at Cameron where the agents lived, and not in Michigan where the plaintiffs reside, strongly tended to prove, that the agents were the agents of the plaintiffs to collect the notes, and were so held out by the plaintiffs. The evidence was therefore properly admitted. (*Sumner vs. Saunders*, 51 Mo., 89; *Howe Machine Co. vs. Snow*, 32 Iowa, 433.) The authority of an agent need not necessarily be proved by any express contract of agency; but may be proved by the habit and course of business of the principal. (*Franklin vs. Globe Mutual Life Ins. Co.*, 52 Mo., 461, and cases cited.)

The next objection made to the action of the court below is, that the court improperly refused the instructions asked for by the plaintiffs, and modified them so as to improperly present the law of the case to the jury. If the instructions as given properly presented the law of the case to the jury as applicable to the facts in evidence, it makes no difference to the plaintiffs, whether the instructions, as originally asked by them before being modified, stated a correct abstract proposition of law or not. All that they had a right to was, that the law growing out of the facts in evidence should be properly presented in the instructions. The instructions as modified tell the jury, that, unless they believe from the evidence, that defendants paid the full amount of the note sued on to plaintiffs, or to some one authorized by plaintiffs to collect the same, or whom the plaintiffs by their acts held out to defendants as being authorized so to collect said note before this suit was brought,

they should find for plaintiffs, and it devolved on the defendants to prove such payment. This instruction as modified certainly stated the law fairly, and was founded on the evidence in the case. As before stated, the notes were made payable at Cameron, Missouri. The agents, when making the sale of the machine and taking the notes, told defendants that they could pay the notes to them at Cameron; the two first notes as they became due were found in the hands of the agents, and paid to them, and the notes taken up. The plaintiffs, when the second note became due, had written to the defendants, requesting them to pay it to these same agents. This they had been told by the agents, when the notes were given, was the way the payments were to be made. If the plaintiffs had by this course of dealing held out those men at Cameron as their agents to receive the money, and this induced the defendants to pay the money to the agents, they ought to be concluded thereby. To permit the principal in such case to deny the authority of the agent would be to perpetrate a fraud upon innocent persons. (Story's Agency, § 127, and cases cited; Johnson vs. Jones, 4 Barb. [N. Y.], 569.)

The plaintiffs also object to the instruction given to the jury by the court, because the jury are told in said instruction, that, if they believe from the evidence, that the plaintiffs held out the persons, to whom the note was paid, as their agents to collect said note, by ratifying his previous acts, etc., that the defendants had a right to pay the note to said agents. This is objected to, because it is insisted, that there was no evidence tending to prove that there was any ratification by plaintiffs of the collection of the note sued on by the agents. The instruction does not assume that there was any ratification on the part of the plaintiffs of the act of the agent in collecting the money on the note sued on. The jury are only told, that if the plaintiffs, by ratifying the previous acts of the agents in collecting the two notes first due, and which had been collected by the agents, etc., had held them out as their agents to collect the money, etc. There was evidence tending to prove a ratification of the agents' acts by the plaintiffs,

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or tending to prove that the agency really existed, and there is no substantial difference between the two. The agents had told the defendants, when the notes were executed, that they could pay the notes to them when they became due. As the two first notes became due, they were found in the hands of the agents, and paid to them; after the first note was paid to the agents, the defendants were requested by plaintiffs to pay the second note to the same agents, which was so paid. It seems to me that if, as the plaintiffs charge, the agents had no original authority to collect the notes, that these acts of the plaintiffs were a complete ratification of the agents' acts, and would amount to a holding out of the agents to the defendants as having full authority to collect the notes.

While the instructions given may not be worded in the most appropriate language, they are substantially correct, and, as we believe, the judgment is for the right party.

The judgment is affirmed. The other judges concur.

In the Supreme Court, Feb. Term, 1874.

James M. Upton, *et al.*, vs. Hiram Jameson, *et al.*

A motion for a re-hearing has been filed in this case, in which it is insisted, that the main point raised by the appellants in the case has been overlooked or ignored in the opinion delivered.

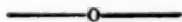
The point referred to is, that the payment of the first two notes by defendants to the agents at Cameron, who had sold the defendants the machine, the notes being in the agents' possession when they became due, did not authorize the court so instruct the jury, that they might infer from such payment an authority in the agents to collect the last or third note when it became due, the same not being in their possession.

That point was not overlooked. The court intended to say in the opinion delivered, that as the agents, who were authorized to sell the machine and take the notes therefor, agreed with defendants that the notes could be paid to agents in Cameron, and as the two first notes as they became due were found in Cameron in the hands of the agents

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and there paid; and as the plaintiffs had requested the defendants, after the first note was paid, to pay the second note to said agents, that these circumstances tended to prove that the plaintiffs not only had notice of the agreement made with the agents that the notes could be paid to them, but they also tended to prove that plaintiffs had ratified the agreement made by the agents, and that, although the instructions given to the jury were not written with technical accuracy, when taken altogether they could not have misled the jury to the prejudice of the rights of the plaintiffs.

The motion will be overruled. The other judges concur.



DANIEL C. YOUNG & Co., Plaintiffs in Error, vs. DUDLEY L. RUTH, et al., Defendants in Error.

1. *Mortgages and deeds of trust—Proceedings at law on same debt—Attachment—Sale of mortgaged property—Purchase by mortgagee—Purchase by stranger—Subsequent foreclosure as to part purchased by stranger—Contribution.*—A. mortgaged certain lands to B., and afterwards, in a proceeding at law by attachment for the debt secured by the mortgage, B. had these lands sold, purchasing a part of them, and C. a stranger purchasing a part. Subsequently B. brought an action on the mortgage, asking for a foreclosure thereof only as to the land purchased by C. *Held*, that B. had no right in an action at law on the debts secured by the mortgage to sell and buy in the mortgaged property, and that his purchase left the lands as they stood before, and that C's purchase, if valid at all, only amounted to a purchase of the equity of redemption; that C. had a right to demand that all the mortgaged property be brought before the court for foreclosure, in order that the other lands might bear their proportion of the entire indebtedness, and that without so doing B. had no standing in court.

Error to Livingston Circuit Court.

Broadus & Pollard, for Plaintiffs in Error.

I. The court erred in holding, that by the sale under the proceedings at law Moore acquired a fee simple title to the land purchased by him. (*Thornton vs. Pigg*, 24 Mo., 249; *Lumley vs. Robinson*, 26 Mo., 364; *Jackson vs. Hull*, 10 Johns., 481.)

Young & Co. v. Ruth, et al.

Norville & Moore, for Defendants in Error.

I. The plaintiffs, having once had judgment for this debt, and against this land, and having had the same sold in satisfaction of part of the debt, cannot afterwards proceed against the same land in the hands of a purchaser under the first judgment. (*Buford vs. Smith*, 7 Mo., 489; *Miles vs. Davis*, 19 Mo., 408.)

II. Though the original debt was secured by deed of trust on the land mentioned in plaintiffs' petition, yet they then chose to proceed by suit in court to enforce their lien and collect their debt; the power of sale contained in the deed of trust was only a cumulative remedy, and does not oust the inherent equitable jurisdiction of the court. (2 Amer. L. Reg. [N. S.], 650, and cases cited.)

ADAMS, Judge, delivered the opinion of the court.

This was an action to foreclose a deed of trust. The case stands here upon a demurrer to plaintiffs' petition, which was sustained by the court, and final judgment rendered thereon against the plaintiffs.

The facts as set forth in the petition are, that the defendant, Ruth, and one Buchanan were indebted to the plaintiffs, for which they executed their several promissory notes payable at different times; and that the defendant, Ruth, in 1860 executed a deed of trust to secure these debts. The deed of trust was executed to Wm. Y. Slack, as trustee, who afterwards died without executing the trust. The deed of trust covered the following lands in Livingston County, to-wit: the southwest quarter and the west half of the southeast quarter of section No. 34, township No. 56 of range No. 22.

The petition further alleges, that after the debts became due a suit by attachment was instituted by the plaintiffs on the mortgage debts, and the lands in the mortgage were attached, and on a final judgment and execution in the attachment suit the mortgaged premises were sold, and the plaintiffs bought all the land, except the east half of the southwest quarter of said section, which was bought by the defend-

ant, Moore, at the price of seven dollars, for which he took the sheriff's deed, and afterwards sold the same to the defendant, Cheney, both of whom purchased with notice of the existing deed of trust. The plaintiffs then ask for a foreclosure of the deed of trust on the piece of land bought by the defendant, and do not bring into the case for a foreclosure the lands bought by themselves. This demurrer was properly sustained.

The plaintiffs had no standing in court to foreclose the deed of trust simply as to the tract of land sold under the attachment to Moore, without bringing the other lands before the court to bear their proportion of the debts.

So far as the plaintiffs were concerned, the foreclosure by them in the proceedings by attachment amounted to nothing; as this proceeding was founded on the mortgage debts, a sale of the mortgaged premises, and a purchase by them, left them as they stood before. They had no right in an action at law on the same debts secured by the mortgage to sell and buy in the mortgaged property. (*McNair vs. O'Fallon*, 8 Mo., 188; *Thornton vs. Pigg*, 24 Mo., 249; *Lumley vs. Robinson*, 26 Mo., 314.) The purchase by the defendant, Moore, if valid at all, only amounted to a purchase of the equity of redemption.

Viewed in the light of a purchaser of the equity of redemption, he has the undoubted right to have the whole mortgaged premises brought before the court for foreclosure, in order that all the other lands may bear their proportion of the entire indebtedness. Whether he could throw the debts on to the other land first, need not be decided or discussed now. As the case stands here, this judgment must be affirmed.

Judgment affirmed. All the judges concur.

MICHAEL ALLEY, Plaintiff in Error, *vs.* JOHN G. GAMELICK,
Defendant in Error.

1. *Justice's court—Damages for injuries to personal property—Jurisdiction of justice.*—An action before a justice to recover damages for the taking and detention of personal property where no claim is made for the recovery thereof, sounds in the injury done to the property as contemplated by sub-division 3, § 3, Art. I, of the act touching Justice's Courts, (2 Wagn. Stat., 809,) and is properly brought under that sub-division, and a judgment for fifty dollars in such case is within the jurisdiction of the justice.

Where suit is brought under sub-division 4, the damages claimed for injuries or detention) are not the cause of action, but are merely incidental to the recovery of a judgment for the specific property sued for.

Error to Andrew Circuit Court.

A. J. Harlan, for Plaintiff in Error.

I. Plaintiff here makes no claim for the recovery of the specific property, but for deprivation of its use. Sub-division 4 refers to replevin cases. There the recovery of the property in specie is the cause of action, and its detention is the incident.

J. P. Allgeler, for Defendant in Error.

VORIES, Judge, delivered the opinion of the court.

This action was brought before a justice of the peace, to recover damages, for the wrongful taking and detention of the personal property of the plaintiff. The cause of action was as follows:

"Plaintiff states that the defendant on the 16th day of November, 1871, at the County of Andrew, and State of Missouri, wrongfully, forcibly and unlawfully seized, took into his possession, drove, rode and carried away, and caused the same to be done, one black mare with a blaze face, and one bay mare, each of the value of one hundred dollars; and one set of double harness of the value of fifteen dollars, all of the personal property of the plaintiff, and unlawfully kept and detained the same from plaintiff, from the said 16th day of November, 1871, to the 2nd day of December, 1871, where-

by the plaintiff was deprived of the use of said property during all that time, to his damage in the sum of fifty dollars, for which he asks judgment.

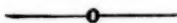
The parties appeared before the justice on the day set for trial, and being ready therefor, a jury was summoned and the parties proceeded to introduce their evidence. After it was closed defendant by his attorney filed a motion to dismiss the suit for want of jurisdiction in the justice. This motion was heard by the justice and sustained, and the case dismissed at the cost of the plaintiff, and judgment rendered accordingly. Plaintiff appealed to the Circuit Court where the parties appeared and defendant again filed a motion to dismiss the appeal and confirm the judgment of the justice. The motion to dismiss is as follows:

"Now comes the defendant and moves the court to dismiss the appeal and confirm the judgment of the justice in this cause and, for grounds, states that this cause having been properly dismissed by the justice for want of jurisdiction, as is shown by the record cannot be tried anew by this court. This motion was sustained by the court and the cause dismissed, and final judgment rendered against the plaintiff. The plaintiff at the time excepted and has brought the case here by writ of error.

The only question presented for the consideration of this court, is, as to the jurisdiction of the justice of the peace over the cause of action filed in the cause. The statute gives justices of the peace jurisdiction over actions for injuries to persons, or to real or personal property, wherein the damages claimed, shall not exceed fifty dollars, and for the recovery of specific personal property not exceeding the value of fifty dollars, alleged to be wrongfully detained, and damages for injuries thereto, or for the taking and detention thereof, not exceeding twenty-five dollars. (Wagn. Stat., 807, §§ 2, 3.) It is insisted by the defendant, that the action in this case is not brought for the recovery of damages for an injury to personal property, but for the recovery of damages for the detention of personal property under the 4th clause in the 3rd section

of the statute referred to; for the recovery of the specific personal property. We think that this construction of the statute is clearly erroneous. In an action for the recovery of specific personal property, the damages claimed are not the cause of the action, but are merely incidental to the recovery of a judgment for the specific property sued for. The action in this case is not for the specific property, but we think is most clearly to recover damages for an injury to personal property within the meaning of the statute. (*Ahern vs. Carroll*, 30 Mo., 200.) The justice had jurisdiction to the amount of fifty dollars, the sum for which the suit was brought. The court therefore, erred in dismissing plaintiff's suit for want of jurisdiction.

This being the only point raised by the record, the judgment must be reversed and the cause remanded. The other judges concur.



STATE OF MISSOURI, Respondent, *vs.* JOSEPH P. HAMILTON,
Appellant.

1. *Practice, Supreme Court—Investive of counsel.*—It is for the trial court to determine whether counsel transcend the limits of professional duty and propriety, and that determination cannot be assigned for error in the appellate court.
2. *Evidence—Testimony as to language uttered in presence of accused—Qui tacet, etc.*—It is not proper in all instances where declarations are made in the presence and hearing of a person, that those declarations should be given in evidence against him. Unless it be shown that the party is immediately concerned, and that his silence might fairly be construed into an admission, the declarations will not be admissible.
3. *Evidence—Impeachment of witness—General reputation as to moral character may be proved.*—In discrediting a witness, the examiner is not restricted to inquiries as to his reputation for truth. The examination may extend to his reputation for moral character generally.
4. *Practice, civil—Witnesses, re-examination of—Matter discretionary with court.*—When a party has examined his witness and the other party has cross-examined him, it is then generally discretionary with the court whether a re-examination will be allowed; and before the Supreme Court will interfere in such a case, manifest abuse and injustice would have to be shown.

*Appeal from Harrison Circuit Court.**Alley & Prettyman, and J. H. Shanklin, for Appellant.**James P. Thomas, for Respondent.*

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted in the Mercer County Circuit Court, jointly with one Caroline Hallock for the murder of Elisha W. Hallock. The indictment was against him as principal in the first degree, and against her as accessory before the fact. Upon the application of the defendant a change of venue, was granted to Harrison county, where the trial was had which resulted in the conviction of the defendant of murder in the first degree.

The only errors complained of and which are exclusively relied upon for a reversal of the judgment, are: 1st. "The action of the court in permitting counsel who was employed by the friends of the murdered man, to take a leading part in the prosecution, and especially to close the case before the jury, and indulge as is alleged, in a strain of invective against the accused." "2nd. In admitting the testimony of the witness Collings, as to what was said in the presence of the accused, as to where the pistol was found with which the act was supposed to have been committed. And 3rd. In excluding the question put to the witness Powell as to the moral character of one of the witnesses, who had been examined on the part of the State.

1st. There is no law in this State to prevent the employment of counsel to assist the Circuit Attorney in carrying on a prosecution. It is very often necessary to promote the ends of justice that it should be done. When counsel are engaged and take part in the conduct of a case, the peculiar position or attitude that they shall assume in reference thereto, is primarily a matter to be arranged between themselves, under the supervision and control of the trial court. It was within the discretion of the court to permit the assistant counsel to conclude the argument in the case, if the prosecuting officer waived his right to do so, and we will not attempt to revise

that discretion here. As to the abusive language made use of by the counsel, his words are not preserved in the bill of exceptions. But this court will not undertake to restrain the attorney in his choice of language in arguing a case before the jury. Epithets and invective, in which counsel sometimes indulge, are frequently matters of taste, and cases often occur in which severe animadversion is deserved and merited. But after all, it is for the court in the presence of which the trial is had to determine whether the counsel transcends the limits of professional duty and propriety, and that determination cannot in any appellate tribunal be assigned for error.

2nd. The witness William Collings testified that he was acquainted with the defendant and identified him in court; that on the evening of Hallock's death he was on his farm when he heard of it, and went over to Hallock's farm about a mile distant; then two or three men whom he named, brought a revolver out of the house, and defendant went into the house with them when they got it. The prosecuting attorney then propounded to the witness the question; "What, if anything, was said by any person in the presence and hearing of the defendant about where the revolver was found?" This question was objected to but the objection was overruled. Witness then answered, saying that he heard one of the men say in defendant's presence, that they found the pistol upstairs between some bed clothes. The further question was then asked, against the objection of the defendant, whether the witness heard any one say in the presence and hearing of the defendant, anything about defendants having shown them the revolver? To this the witness answered, that when the men came down stairs together and out of the door, one of them stated in the presence of the prisoner and only a step or two distant from him, that they had got the pistol up stairs between some bed clothes. The witness then stated that the prisoner might have been three steps distant, but that was the outside limit as to distance that he placed upon it.

It is not in all instances, where declarations are made in the

presence and hearing of a person, that those declarations can be given in evidence against him; they frequently call for no reply and sometimes they are impertinent and deserve no notice. Unless it is shown that the party is immediately concerned, and that unless he did speak, his silence might fairly be construed into an admission, the declarations will not be admissible. No proper foundation had been laid when this evidence was admitted. But afterwards, the fact of the pistol being found, and the place where it was found, was directly proved by other testimony and the declarations were therefore not merely irrelevant but utterly harmless.

3rd. Sewell Hoyne was a witness for the State, and the defendant with a view of impeaching his testimony, introduced one John Powell who testified, that he was pretty well acquainted with Hoyne's general reputation for truth and veracity in the neighborhood in which he resided, and that it was not very good. On cross-examination Powell stated that he had never heard but one man say anything in regard to Hoyne's reputation for truth. The defendant then attempted to re-examine the witness, and asked him if he was acquainted with the moral character of Hoyne. This question was objected to by the State, and the objection was sustained. It is undoubtedly true that the decisions in this State have followed those authorities which declare the doctrine, that in discrediting a witness, a party is not restricted to inquiries into his character for truth, but that the inquiry may extend to his moral character generally. (State vs. Shields, 13 Mo., 239.) But in the present case the defendant had made an attempt to impeach the witness' character for truth and veracity, and had turned his witness over to the prosecution for cross-examination. After the cross-examination was completed, he then sought to again open examination in chief and attack the impeached witness' moral character. Whether he could do so under such circumstances, was a question depending very much on the discretion of the court trying the cause. When a party has examined his witness, and the other party has cross-examined him, it is then generally discretionary with the court whether

a re-examination will be allowed, and before this court would interfere in such a case, manifest abuse and injustice would have to be shown. Nothing of the kind appears here, but on the contrary, the whole record so overwhelmingly sustains the verdict, that it would be violating every principle of criminal justice for this court to interfere.

The judgment should be affirmed.



BENSON BOND, Defendant in Error, vs. LUKE W. BEMIS.
Plaintiff in Error.

1. *Partnership—Action at law will not lie between.*—The law is well settled, that one partner cannot maintain an action at law against his co-partner for money paid on account of the indebtedness of the firm.

Error to Clay Circuit Court.

D. C. Allen, for Plaintiff in Error

ADAMS, Judge, delivered the opinion of the court.

This was an action on a promissory note for five hundred dollars.

The note is a negotiable note and reads as follows:

(\$500.00.)

St. Louis, October 27th, 1868.

Thirty days after date, I promise to pay to the order of Benson Bond, Five Hundred Dollars for value received, negotiable and payable without defalcation or discount at —

L. W. BEMIS.

On which note the name of the plaintiff "Benson Bond" appears to have been indorsed in blank.

The defendant by way of answer to plaintiff's petition founded on his note, substantially set up the averment that prior to the making of said note, he and plaintiff had been in partnership in business in the City of St. Louis, and that the firm was indebted to the amount of some eight thousand dollars; and that the plaintiff retired from the firm under an agreement

that the debts due from the firm were to be renewed in the name of the defendant with the plaintiff as indorser, but that they were still to remain the debts of the firm till paid off; and defendant was to carry on the business in his own name for himself, and collect the assets of the firm and pay the debts; that, being pressed for money to pay some debts, they applied to the National Bank of the State of Missouri for five hundred dollars, and borrowed that amount of that bank, and gave the promissory note in suit for the same, with said defendant as principal and the plaintiff as indorser; that this money was paid to the defendant and he paid it over on said debt of said firm. He then charges in substance, that this debt to the bank was a firm debt, and if paid by the plaintiff is still one of the firm debts and must be adjusted on final settlement; that no settlement has yet been made nor any balance struck of their partnership matters. The court on motion of plaintiff struck out this answer as forming no defense to plaintiff's petition. And to this action of the court the defendant excepted. The court thereupon rendered a final judgment against defendant for the amount of the note, and the defendant filed motions for a new trial, &c., which were overruled and exceptions duly saved.

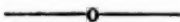
The law is well settled, that one partner cannot maintain an action at law against his co-partner for money paid on account of the indebtedness of the firm. Such debts can only be adjusted on a final settlement between the partners; and a suit in chancery is the proper remedy. This note, though standing in the name of the defendant as maker, and plaintiff as payee, was from the allegations of this answer the note of the firm, given to raise money to meet their liabilities. When the plaintiff took up the note, if the facts stated in the answer be true, the firm became liable to him for the amount; but whether anything would be due to him, after taking into consideration all the debts and liabilities of the firm, and the payments which each member may have made, could only be ascertained by a final settlement.

In my judgment the answer set up facts sufficient to con-

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stitute a legal bar to the plaintiff's recovery, and the court erred in striking it out.

Judgment reversed and cause remanded. The other judges concur.



SMITH AND BOWLAND, Respondents, vs. THE BURLINGTON & MO. R. R. R. Co., Appellant.

1. *Practice, civil—Pleadings—Corporation cannot deny its existence, when.*—In a suit by attachment against a foreign corporation, where defendant voluntarily appeared and gave bond in its corporate name, *held*, that the company was thereby estopped from denying its corporate existence. (*Seaton vs. Chicago, R. I. & P. R. R. Co.*, ante p. 416.)

Appeal from Andrew Circuit Court.

Strong's & Hedenberg, and Bennett Pike, for Appellant.

Greenlea, Heren & Rea, for Respondents.

NAPTON, Judge, delivered the opinion of the court.

This suit was to recover about \$324, alleged to be due the plaintiffs for railroad ties furnished the defendants. The Burlington & Mo. R. R. R. Co. answered the petition, denying the partnership of plaintiffs and denying that the Burlington & Mo. R. R. R. is a corporation created, existing or doing business under and by virtue of the laws of Iowa; and denying that said R. R. Co. was so incorporated, existing and doing business on Oct. 1st, 1869, &c., and deny all the other allegations of the petition. There was a verdict against the company. The suit was dismissed as to Jameson. Motions for new trial and in arrest were made and overruled and judgment was rendered against the defendant, the B. & Mo. R. R. R. Co.

On the trial it appeared that the plaintiffs had furnished the defendants with the ties charged, and the only matter in dispute was whether these ties were furnished to Jameson, who

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had a large contract with the company, or whether Jameson acted as the company's agent or professed so to act, and the credit was given to Jameson and not to the company. The evidence on this point was contradictory, but the question was submitted to the jury upon instructions which were unexceptionable. Indeed all the defendant's instructions on this point which were asked were given, and the instruction given by the court on its own motion covered the whole case. It was this: "If the jury believe from the evidence, that the plaintiffs were partners, and that Jameson contracted with plaintiffs or either of them, on behalf of the firm, to get out and furnish ties and timber for the defendant, the B. & Mo. R. R. Co., representing himself to be, and acting as the agent of said company in making said contract, and that the plaintiffs furnished ties and timber to the said R. R. Co. by its agent on said contract, and that such ties or any part of them remain unpaid for, the jury will find for the plaintiffs against the B. & Mo. R. R. Co. the amount yet due on said ties, with interest, &c."

Objections were taken to the proof offered by plaintiffs of the act of incorporation of defendant, which was proved by a copy of the articles of association, certified to by the Secretary of State of Iowa, but the Laws of Iowa were not produced.

We think proof of this point was unnecessary, since this was a suit by attachment against a foreign corporation, and the defendant voluntarily appeared and gave the necessary bond in its corporate name by which the attachment was dissolved and thus appeared on the record of the suit. The defendant was by this estopped from denying its corporate existence. (See the case of *Seaton vs. Chicago, Rock Isl. & P. R. R. Co.*, decided at this term, *ante*, p. 416.)

Judgment affirmed. All the judges concur.

Cornelius, et al. v. Smith, et al.

BENJAMIN CORNELIUS, *et al.*, Appellants, *vs.* MARGARET SMITH,
et al., Respondents.

1. *Conveyances—Construction—Trusts—Uses.*—A conveyance was made to A. a married woman, conveying certain land to "her and her heirs forever," and providing that if B., who was a son of A. "should pay to each of the other heirs five hundred dollars and keep his father during life, then he will have and shall hold the same, and to his heirs and assigns forever, otherwise the same to be divided with all the heirs equally." *Held*, that the deed was not intended to vest the estate to the land, legal and equitable, in the grantee, but that she was to have the whole estate until the death of her husband, and at his death she became a trustee for B. and his brothers and sisters, the children of her husband; that by the terms of the deed B. was to be the sole beneficiary if he supported his father during his life, and paid the other children five hundred dollars each, but if he failed to do this, he was to share equally with the other children; and as a person while living cannot have heirs, the word heirs was not used in its technical sense, and meant the children of A's husband.
2. *Trusts—How created—How manifested.*—A trust need not be created by writing, but must be manifested and proved by writing.

Appeal from Buchanan Circuit Court.

Hall, Oliver and Vineyard, for Appellants.

I. The language of the conveyance created a trust in Mrs. Campbell for the benefit of James R. Campbell if he should do certain things, and in the event of his failure, for the benefit of himself and the other heirs of James Campbell. James R. Campbell was spoken of as "an heir," and the remaining beneficiaries are spoken of as the "other heirs." This language clearly shows that the phrase "other heirs" meant heirs like, but others than himself. In the event of his failure to fulfill the conditions, he and the other heirs of James Campbell became joint beneficiaries.

II. If this description of heirs is too indefinite, then a trust results to James Campbell, who according to the allegations in the petition was the real owner of the land, and his heirs after his death became the equitable owners of the same. If this use limited by the deed could not vest or was not to vest but upon a contingency, or if when the purposes for which an estate has been conveyed fail by accidents or other-

wise, either on whole or in part, the use results to the grantor. (4 Kent, 299-307.)

III. The trust for James R. Campbell if he did certain things, and if he did not do what was required then to the heirs, is a springing use which was valid and will be recognized and enforced by the court. (4 Kent, 301.)

IV. A conveyance to B. to the use of C. in trust for D. executes the trust in D., though he has not the legal estate. (4 Kent, 305.)

Benj. F. Loan & Strong's and Hedenberg, for Respondents.

I. It is clear that if James Campbell, deceased, had no legal or equitable interest in the land at the time of his death, then the appellants have received no interest by inheritance from him; and the deed set out in the petition shows that the legal title to the land was conveyed to Margaret Campbell absolutely. James Richard Campbell got no interest in the land either contingent or otherwise by their deed. He could not compel Margaret Campbell to convey to him, "by paying \$500, to each of the other heirs," nor by supporting his father during his life-time.

II. The deed does not express a trust; on the contrary, it is upon its face a general warranty deed without reserve and without limitation as to her.

III. James Campbell, were he alive, could not invoke nor procure the aid of a court of law or equity to divest his wife of the title conveyed to her by Bermond; nor to enforce upon her the fulfillment of any trust upon the same for his use. His heirs, then, as such, cannot assert any title or claim to the land against said Margaret. Their right is neither more nor less than that of the ancestor through whom only the claim here is asserted.

IV. The deed to Margaret Campbell, now Smith, must be so construed as to give it effect as a conveyance of the fee to her, because it says it conveys the land "to her and to her heirs," &c.; and if the interpolated clause respecting said

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James Richard Campbell is repugnant to the general tenor and effect of the deed, then such repugnant provisions will be disregarded. No trust results to a husband who purchases property and causes it to be conveyed to his wife. (*Turner vs. Turner*, 44 Mo., 535; *Alexander vs. Warrance*, 17 Mo., 288; see also *Henderson vs. Henderson's Exr.*, 13 Mo., 157.)

ADAMS, Judge, delivered the opinion of the court.

This was an action in the nature of a bill in chancery for partition of a tract of land in Buchanan county. The case stands here on a demurrer to the plaintiffs' second amended petition, which was sustained by the Circuit Court. The petition reads as follows:

"Plaintiffs, for their second amended petition, state that Elizabeth Cornelius, Martha Jane Bermond, James R. Campbell, Mary Ann Rapp and Margaret Campbell, are the sole surviving children and only heirs of James Campbell, deceased, who departed this life before the bringing of this suit, and that defendant, Margaret Smith is the widow of said James Campbell, deceased; the plaintiffs further state, that at the time of bringing this suit, Benjamin Cornelius and Elizabeth Cornelius were and they are still husband and wife, and that John Bermond and Jane Bermond were and still are husband and wife, and that Benjamin Rapp and Mary Ann Rapp were and still are husband and wife.

"Plaintiffs further state, that on the 19th day of September, 1859, in the life-time of said James Campbell, deceased, the plaintiff, John Bermond, was seized in fee of the land hereinafter described, to the use of James Campbell, deceased, and that said use was not manifested in writing, but was always acknowledged by said Bermond. Plaintiffs further state, that said Bermond being seized of said land, the said James Campbell, deceased, in his life time, to-wit: on said 29th day of September, 1859, requested and desired said Bermond to convey said land to his said wife, Margaret Campbell, subject to certain conditions expressed in said conveyance, and that said Bermond and his wife, in accordance with said request,

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did make, execute and deliver to said Margaret Campbell, now Margaret Smith, a deed to the effect following: that is to say: This deed made and entered into this 19th day of September, in the year of our Lord Eighteen Hundred and Fifty-Seven, by and between John Bermond, Jr., and Martha Jane Bermond, his wife, of the County of Buchanan and State of Missouri, of the first part, and Margaret Campbell and her heirs of the County of Buchanan and State of Missouri of the second part, witnesseth, that the said parties of the first part, for and in consideration of the sum of five thousand dollars, the receipt whereof is hereby acknowledged, have given, granted, bargained and sold, and by these presents do give, grant, bargain and sell and confirm and convey unto the said party of the second part and to her heirs forever, a certain tract, piece or parcel of land lying and being in the County of Buchanan and State of Missouri, to-wit: The North-East Qr. of Sec. 16, in Township No. 57, and of Range 34, containing a saw mill, carding machine and a grist mill with all the fixtures thereto belonging, if James Richard Campbell should pay each of the other heirs five hundred dollars each and keep his father during life, then he will have and hold the same and to his heirs and assigns forever, otherwise, the same to be divided with all the heirs equal, to have and to hold the said tract, piece or parcel of land, with all the privileges and appurtenances thereunto belonging or in anywise appertaining unto the said party of the second part and to her heirs forever; and the said parties of the first part for themselves, their heirs, executors and administrators do covenant and agree, that they will warrant and forever defend the title to the said tract, piece or parcel of land and every part thereof unto her, the said party of the second part and her heirs, against the claim or claims of all persons whatever, claiming or to claim the same or any part thereof.

The plaintiffs state, that in truth and in fact there was no consideration whatever paid or to be paid for said deed, and that the same was executed in discharge of said trust at the request of said James Campbell, deceased, and for no other consideration whatever.

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Plaintiffs further state, that said defendant, James Richard Campbell has never paid said five hundred dollars to each of said heirs or any other sum to each or any of said heirs; nor did he keep his father during his life; nor did he contribute anything towards the keeping or support of his father, the said James Campbell, now deceased. Whereupon plaintiffs say that defendant, Margaret Smith, as the widow of said James Campbell, deceased, is entitled to dower in said lands, and the other parties to this suit being the only children and heirs of said James Campbell, deceased, are equitably entitled to said lands, subject to said dower; that is to say, each of said heirs is entitled in equity to one undivided fifth part of said lands, subject to said dower. Plaintiffs therefore pray, that the dower of said Margaret Smith in said lands be admeasured and set off to her, and that the remainder of said land be partitioned, if the same can be done without great prejudice to the parties in interest, and if that cannot be done the plaintiffs pray for a sale of the premises and a division of the proceeds thereof, among all the parties, according to their respective rights and interests; and plaintiffs pray for such other and further relief as they may be entitled to in the premises."

The determination of this case must be dependent upon the construction to be given to the deed from John Bermond and wife to Margaret Campbell set forth *in haec verba* in the petition. It is not a common law conveyance, but a deed of bargain and sale, being one of the modes of conveying real estate under the Statute of Uses. Under the old common law conveyances, an estate could not be limited to a stranger to the deed, except by way of remainder, and it may be that a legal title cannot be created in a stranger to a deed under the Statute of Uses. But since the Statute of Uses, such deeds are the only kind in common use in family settlements, in which contingent and springing trusts are intended to be created and to arise in favor of the beneficiaries.

The courts have extended to these settlements the same liberal construction they have given to executory devises. This deed was not intended to vest the absolute estate to the land,

legal and equitable, in the grantee, Mrs. Campbell. The fair and only reasonable construction is, that she was to have the whole estate until the death of her husband, James Campbell, and at his death she became a trustee for James Richard Campbell and his brothers and sisters, being the children of James Campbell. That is, by the terms of the trust, James Richard Campbell was to be the sole beneficiary if he supported his father during his life and paid the other children each five hundred dollars; but if he failed to do this, he was to share equally with the other children.

The word "heirs" is used in the deed to denote the beneficiaries, but evidently not in its technical sense. It means the children of the father, James Campbell, who was to be supported by his son, James Richard Campbell. The son, James Richard Campbell, is expressly named as a beneficiary and as one of the heirs; and as a person while living cannot have heirs, we must necessarily conclude that the word "heirs" in this connection meant children of James Campbell. This limitation of the trusts of this deed must amount to a nullity or have this construction. The deed is awkwardly written, but in my judgment it was intended as a deed of settlement in which the trusts in favor of the children were to spring up on the death of their ancestor, James Campbell.

As the parties allow Mrs. Smith, formerly Mrs. Campbell, to retain dower in the land, it is unnecessary to decide whether her title to dower in the original trust was affected by the transfer of the whole legal title to her or not. A court of equity might protect her in the enjoyment of what originally belonged to her, notwithstanding she may have become trustee for others. So far as the plaintiffs are concerned, this trust is sufficiently manifested by their petition. A trust need not be created by writing, but must be manifested and proved by writing.

This is not an action at law, but an action in equity for the partition of equitable property, and I can see no good reason why such property may not be partitioned in equity, or why a sale should not be made and the proceeds divided, if a division in kind would result in great prejudice to the owners.

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Under these views, the court erred in sustaining the demurrer to plaintiffs' petition.

Judgment reversed and cause remanded; Judge Vories not sitting. The other judges concur.

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WILLIAM W. AND JAMES A. HENDERSON, Respondents, *vs.*
JAMES HENDERSON, SR., WASHINGTON A., JAMES A., AND
GEORGE S. HENDERSON, Appellants.

1. *Land titles—Action to set aside deed—Change of venue—Jurisdiction—Construction of statute.*—In a proceeding to set aside a conveyance of lands, venue may be changed from the county in which the land is situated, and the court to which the cause is so removed will thereby obtain jurisdiction of the res. This proposition is not in conflict with the Practice Act. (Wagn. Stat., 1905, § 3.)
2. *Want of jurisdiction over subject—Right to take advantage of, never lost.*—The want of jurisdiction over the subject matter of an action may be taken advantage of at any time.
3. *Change of venue—Failure to transmit papers—Discontinuance, etc.,—Motion to dismiss—Appearance.*—A case, sent by change of venue from one court to another, is not discontinued by reason of the failure of the clerk to transmit the transcript before the third term after the date of the order. The statute (Wagn. Stat., 1857, § 12), is directory merely. But *semble*, that where the other party appears in the court to which the cause is removed, at the second term after date of the order, produces the order, and prays a discontinuance on the ground that no transcript has been sent over, the court may be justified in dismissing the cause. But it is otherwise, where the parties appear and go to trial.
4. *Practice, civil—Supplemental answer—Leave to file at close of evidence, etc.*—It is a matter resting in the discretion of the Circuit Court under the circumstances of the case to allow or forbid the filing of a supplemental answer, after the evidence is closed. Where, for example, the facts proposed to be set up might have been discovered by use of ordinary diligence, and it did not appear that the refusal would work a prejudice to the applicant, the court acted properly in refusing permission to file such further pleading.
5. *Practice, civil—Deed—Allegation of record—Proof of loss and contents.*—The allegation in a petition that a deed had been recorded, will not prevent plaintiff from proving that in fact it had not been recorded, and further proving its loss and contents.

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6. *Lost instrument—Acknowledgment—Court, entry of—Parol evidence.*—Where a deed was shown to be lost or destroyed, held, that the grantee was not compelled to introduce an entry of its acknowledgment which had been made in open court, as the best evidence of the execution of the instrument, but might resort to parol evidence.
7. *Fraud not presumed, when.*—Fraud will not be presumed, when all the facts in the case consist as well with honesty and fair dealing as they do with the intention to defraud.
8. *Fraudulent conveyance—Vendee must have notice, etc.*—In order to defeat the title of a purchaser from one who conveys lands with a fraudulent intent, the vendee must have notice of the intent, or participate in the fraud.
9. *Fraudulent conveyances, made to defeat certain creditors—Effect of.*—A debtor may convey his property to a portion of his creditors to the exclusion of others, but if the intention of such conveyance be to defeat certain other creditors, the deed as to them is fraudulent, and (the vendee being cognizant of the intent) is void.

Appeal from Platte Circuit Court.

Thos. McCarty, Routt & Rucker, and D. C. Allen,
for Appellants.

I. This action is *in rem*. (Wagn. Stat., 1005, § 3; Han. & St. Jo. R. R. vs. Mahoney, 42 Mo., 469-471; Doe vs. Oliver, 2 Smith's Lead. Cas., § 585; Freeman Judg., pp. 504-6 § 606.)

II. Neither acquiescence nor consent, can confer jurisdiction. (Germond vs. People, 1 Hill, 343; Dudley vs. Mayhew, 3 Com., 9; Clyde & Rose Plankroad vs. Parker, 22 Barb., 323; Freeman Judg., § 120, and authorities there cited; Bangs vs. McIntosh, 22 Barb., 591.)

III. The law requires transcripts on change of venue to be filed at or before the second term after the order. (Wagn. Stat., pp. 1356-7, §§ 7, 12.)

IV. James Henderson, Sr., had the undoubted right to prefer one creditor over another. (Cason vs. Murray, 15 Mo., 378; Drury vs. Cross, 7 Wallace, 302; Tompkins vs. Wheeler, 16 Peters, 106; Marden vs. Babcock, 2 Metc., 99; Auburn Ex. Bank vs. Fitch, 48 Barb., 344.)

V. The petition alleges the acknowledgment and record of the deed. Witness Hardwick says it was not recorded. A par-

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ty cannot contradict his own pleadings. Such testimony would operate a surprise on the other party, and on that score was wrong.

VI. A copy of the record entry of the acknowledgment, was, after proof of loss, the next best evidence. (Wagn. Stat., 612, §§ 56-7; Greenl. Ev., [Ed. 1859,] p. 119, § 82, p. 124, § 86, p. 127, § 88; Commonwealth vs. Kinison, 4 Mass., 646; Waterman vs. Robinson, .5 Mass., 309; Philipson vs. Bates, 2 Mo., 116; Milan vs. Pemberton, 12 Mo., 598; Medlin vs. Platte Co., 7 Mo., 235; 1 Phillips on Evidence, 588.)

E. H. Norton, J. E. Merryman and Samuel Hardwick, for Respondents.

I. After the order, the Platte Circuit Court had jurisdiction. The statute (Wagn. Stat., 1356-7, §§ 7, 12;) is directory. (Sedg. Stat. & Const. Law, pp. 368, 372.) By appearing to the suit in that court, they waived objections to venue. (Powers vs. Browder, 13 Mo., 154; Smith vs. Elder, 3 Johns, 105; Street vs. Chapman, 29 Ind., 142; Burnham vs. Hatfield, 5 Blackf., 21; Gilstrap vs. Felts, 50 Mo., 428.)

II. And a party may recover upon parol evidence of the contents of a deed, when it is lost. (Smith vs. Phillips, 25 Mo., 557; Newman vs. Studley, 5 Mo., 291; Jackson vs. Rice, 3 Wend., 183; 3 Yates, [Penn.] 184.)

III. The testimony raises the presumption, that Henderson's conveyance was designed to defeat his creditors, and in an equity case like this, fraud may be presumed. (King vs. Moon, 42 Mo., 551.)

VORIES, Judge, delivered the opinion of the court.

This action was originally brought in the Clay Circuit Court to set aside a conveyance of certain lands described in the petition, situate in Clay county, on the ground of fraud. The cause, after the action was commenced, was taken to the Circuit Court of Platte county, by change of venue.

The charges in the petition were as follows: That on the first day of June, 1856, defendant James Henderson, was in-

debted to one George Henderson on a promissory note for \$6,500; that on the 31st day of March, 1859, George Henderson died, and Wm. W. Henderson, one of the plaintiffs, became his administrator; that said note came into his hands as part of the assets of the estate, and that he instituted suit on the same and recovered judgment against said James Henderson on said note; that execution was issued on said judgment and levied on the land described in the petition, and sold at sheriff's sale, and plaintiffs became the purchasers. The petition further states, that on and before the 24th day of July, 1860, and at different times, said James Henderson, with intent to avoid the payment of the said debt and to defeat said Wm. W. Henderson in collecting it, attempted to dispose of said lands for that purpose; that, to accomplish that object, he conveyed said land by mortgage with power of sale to David M. Rivers, and others therein named, said mortgage being the same that was recorded in Record Book "R." page 631, of the records of Clay County, all of which were recited to be for the purpose of securing certain debts therein described, all of which debts if real and *bona fide* on the part of the mortgagees, were contracted, by said James Henderson, with the fraudulent intent, to cheat, wrong and defraud said Wm. W. Henderson in collecting said debt; that said James Henderson disposed of property, much of which had been procured by notes secured by said mortgage, and placed the same and other monies and means of said James Henderson, in the hands of Geo. S., Jas. A. and Washington A. Henderson, who were the sons of James Henderson, and pursuant to said fraudulent intent and covenanting with said Washington A., George S. and James A. Henderson, he did procure that the land be conveyed by a pretended sale under said mortgage; and by virtue of such pretended sale, said James Henderson procured that a deed be executed by certain of said mortgagees, purporting to convey said real estate to said W. A., Geo. S. and James A. Henderson, the said sons of James Henderson, which deed was recorded in Record Book "U." page 304; that if any monies were paid at said pretended

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sale, they were the monies of said James Henderson. Wherefore, plaintiffs charge that said deeds are fraudulent and void, and ask that the court will so declare, and for other proper relief, &c.

To this amended petition the appellants Washington A. Henderson, James A. Henderson and George S. Henderson, filed their separate answer, in which, after admitting that James Henderson, Sr., was their father; that he executed the mortgage dated July 24th, 1860, set out in the amended petition; that said land was sold under said mortgage, January 30th, 1861; that prior to January 30th, 1861, their father owned the lands in controversy; that the deed to them from the mortgagees of James Henderson, Sr., mentioned in the amended petition, was made, &c., and alleging that the mortgage of July 24th, 1860, and debts therein mentioned were *bona fide*, they denied specifically and fully all of the other allegations in the amended petition. The answer then stated that the father and co-defendant of said defendants on the 24th day of July, 1860, (the date of the mortgage named in the petition) was indebted to Joseph Thompson, S. S. Major, Wm. McIlvaine, L. W. Laville, David M. Rivers, George E. Claybrook, David Willis, Washington Huffaker, John A. Denny, Thomas M. Gozney, Martha Marsh, Thomas Suter, William Atchison, and to the Farmers' Bank in various sums of money, amounting in all to a sum of between eight and ten thousand dollars, besides interest thereon, and that Thomas Gozney, Horace Anderson, Anthony Haizel and John M. Wilkerson, were the sureties for said James Henderson, Sr.; for the payment of a part of said debts; that said debts were secured or evidenced by promissory notes, executed by said James Henderson, Sr.; that their co-defendant James Henderson, Sr., on said 24th day of June, 1860, executed the mortgage named in the petition, in order to secure said debts and to save his sureties thereon; that the mortgage was executed to a portion of the persons to whom he was so indebted, conveying to them the land in controversy with personal property therein named; that said

mortgagee, contained a power in favor of the grantees therein, or any three of them, to sell the property named in the mortgage, at any time after the 1st day of January, 1861, at public sale to the highest bidder, after giving notice &c., and with the proceeds of the sale to pay first, the expenses of the trust, and next, whatever might remain unpaid upon the debts named in the mortgage, either of principal or interest, and the remainder, if any, to be paid to the mortgagor.

The answer then further states, that the said debts were not paid, and that the mortgagees on the 31st day of January, 1861, after having given the notice required, (20 days) sold the land in controversy in conformity with the provisions of the mortgage; and that the said defendants were the highest bidders at said sale for the land in controversy, and became the purchasers thereof for the sum of \$2150.00, which said sum was paid and the land conveyed to them under the power in the mortgage; that they purchased the land in good faith and paid therefor without fraud.

In the separate answer of James Henderson, Sr., it was further alleged, that on and before July 24th, 1860, he was *bona fide* indebted to the persons, and in the amounts named in the said mortgage; that said mortgage was executed by him in good faith to secure the payment of such debts; that he executed said mortgage dated July 24th, 1860, to the mortgagees named in it; that he failed to pay the debts in said mortgage mentioned, that certain of the mortgagees named in said mortgage, acting under the power granted to them therein, sold the property real and personal, mentioned in the mortgage on the 30th day of January, 1861; that at such sale, his co-defendants became the purchasers in good faith of all the lands mentioned in the mortgage for the sum of \$2,115; that the mortgagees conducting such sale, made his co-defendants a deed to said lands in due form, transferring to them all of the interest therein of him, James Henderson, Sr.; that no part of said sum of \$2,115, bid and paid by his co-defendants, for said lands, was his property; and that he since the 30th of January, 1861, has not had nor has he now, any interest in said lands.

The answer of James Henderson, Sr ; did not deny his indebtedness to the estate of George Henderson, or the judgment in favor of William W. Henderson, his administrator, thereon, or the execution, levy, sale and sheriff's deed to plaintiffs as is stated in the petition, but he expressly denied the allegations of fraud. To these answers, the plaintiffs filed replications, putting in issue the affirmative allegations therein. At the March term of the Clay Circuit Court for the year 1871, the plaintiffs filed their motion for a change of the venue of said cause, which motion was sustained by the court, and the venue changed to the Platte Circuit Court, and the clerk of the Clay Circuit Court was ordered to certify and transmit a copy of the record and the papers in the cause to the Platte Circuit Court.

Afterwards, at the October Term of the Platte Circuit Court in the year 1872 (that being the first appearance of either party in said court), the plaintiffs appeared by their attorney, and upon their motion the case was continued to the next term of the court at their costs, for which judgment was rendered. Afterwards, at the next April term of said court, leave was granted to the plaintiffs to withdraw the transcript filed in the cause for the purpose of having the same corrected, and the cause was set for trial on Tuesday, the 7th day of said Term.

On the 14th day of April, 1873, both parties appeared in the Platte Circuit Court by their respective attorneys, when the defendants filed a motion to dismiss the suit and strike the cause from the docket (it being stated in the motion that the defendants appeared only for the purpose of the motion), because the transcript was not filed as required by law ; because the papers and transcript when filed, were filed on the 18th day of March, 1872, and were certified without any seal of the Clay Circuit Court being affixed ; because no transcript with the seal affixed was filed until the 11th day of April, 1873 ; because the court improperly allowed the plaintiffs to withdraw the transcript for the purpose of having the seal of the Clay Circuit Court attached to the record ; because no transcript or

record of the cause, certified under the seal of the Clay Circuit Court, was filed at or before the second term of the Platte Circuit Court after the order for the change of venue was made, but that three terms of said court had elapsed since the venue had been changed, and because the failure to file the transcript in time, had worked a discontinuance of the cause, and the Platte Circuit Court had no jurisdiction thereof.

It was shown on the hearing of said motion, that no transcript of said cause was filed in the office of the Clerk of the Platte Circuit Court until the 18th day of March, 1872, and that the transcript when filed had no seal of the Clay Circuit Court affixed thereto until the 11th day of April, 1873. It was also shown upon the hearing of said motion, that the defendants caused subpoenas to be issued for witnesses in said cause on their behalf at the October Term of the court in the year 1872, and also at the April Term, 1873. The court overruled the motion and the defendants excepted. On the 15th day of April, 1873, both parties appeared and a jury was impaneled in the cause. The jury was afterwards discharged by the agreement of the parties, and by their further agreement the issues in the cause were submitted to the court. During the progress of the trial, the plaintiffs offered to and did show, by evidence, that the original deed from the sheriff of Clay County to the plaintiff for the land in controversy, had been filed with the original petition in the Clay Circuit Court at the commencement of the action; that it was attached to the petition; that it had by some means unknown become detached, and after diligent search in all proper places could not be found, and that it had never been recorded so that a copy could be procured. The plaintiffs offered to prove the contents of the deed by parol evidence. The defendants objected because it was stated in the petition that the deed was recorded and filed with the petition in the cause. These objections were overruled by the court, and the contents of the deed proved to be in the usual form and executed to the plaintiffs jointly. To the action of the court in overruling the objections of the defendants to this evidence they at the time

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excepted. The defendants also objected to all evidence offered by the plaintiffs upon the trial of the cause, on the ground that the court had no jurisdiction of the cause, for the reason that the case had been discontinued on account of the failure of the Clerk of the Clay Circuit Court to file in the Platte Circuit Court a transcript and the papers in the case on or before the second term after the granting of the change of venue. This objection being overruled the defendants excepted. At the close of the evidence and before the case had been argued and finally submitted to the court, the defendants asked leave of the court and offered to file a supplemental answer on the part of James Henderson, Sr. The court refused to permit said supplemental answer to be filed, to which ruling of the court the defendants again excepted. The court rendered a judgment and decree in favor of the plaintiffs, declaring the deed made to the defendants, James A. Henderson, Sr., Samuel Henderson and Washington Henderson to be void, and vesting the title to the land in controversy in the plaintiffs as prayed for by the petition. The defendants in due time filed their several motions for a new hearing and in arrest of judgment, assigning as causes therefor the rulings of the court hereinbefore excepted to, as well as that the decree was for the wrong party and against the evidence, and all other causes usually assigned for such motions. The court overruled these motions. Defendants excepted and appealed to this court.

There are several points presented by the record in this case for the consideration of this court. It is first contended by the appellants, that the Platte Circuit Court had no jurisdiction of the cause; that the motion of appellants to dismiss the case from the docket ought to have been sustained by the court. The ground of this motion which is relied on by the appellants is, that the transcript of the record of the Clay Circuit Court with the papers in the cause were not filed in the Platte Circuit Court, or in the office of the Clerk thereof, at or before the second term of the Platte Circuit Court, after the venue was chang-

ed in and from the Clay Circuit Court, and that the case was thereby discontinued; that this being an action to recover—or affecting—real estate, the action is local, and the Platte Circuit Court could have no jurisdiction thereof, even if the parties on both sides had appeared without objection.

Our statute provides, that suits whereby the title to any real estate may be affected, shall be brought in the county where some part of such real estate may be situated. (Wagn. Stat., 1005, § 3.)

This of course would give the original jurisdiction over this case to the courts in the County of Clay, where the land is situated; but the cause was removed from Clay county by change of venue ordered in the Clay Circuit Court. The statute concerning changes of the venue in causes, after providing the manner in which a change of venue may be taken from one county to another, further provides, that “when any such order shall be made by the court or judge, the clerk shall immediately make out a full transcript of the record and proceedings in the cause, including the petition and affidavit and order of removal, and transmit the same duly certified, together with all of the original papers filed in the cause and not forming a part of the record, to the clerk of the court to which the removal is ordered; and for failure to do so shall forfeit one hundred dollars to the party aggrieved, to be recovered by civil action.” (Wagn. Stat., 1356, § 7.)

By the 12th section of the same act it is provided, that “If any clerk fail to transmit the transcript and papers in any cause when the venue thereof has been changed, or if the papers be sent and lost, such loss or failure shall not operate as a discontinuance of such cause, but the same may be filed at the next term of said court, or if lost, copies of the original may be furnished and filed, and the court shall proceed as if no such failure or loss had happened.”

It is insisted by the appellants, that the papers in this case were not filed in the office of the Clerk of the Platte Circuit Court until the third term thereof after the order changing the venue was made, and that therefore the

cause was discontinued, and the Platte Circuit Court could have no jurisdiction of the cause. There can be no doubt but that the original jurisdiction of the cause was in the Clay Circuit Court, and that originally the Platte Circuit Court had no jurisdiction over the subject matter of the action. And there is no doubt that the want of jurisdiction in the court over the subject matter in an action can be taken advantage of at any time. In this case when the order was made by the Clay Circuit Court, changing the venue of the cause to the Platte Circuit Court, its effect and operation was to confer jurisdiction over the subject matter of the action on the Platte Circuit Court. This jurisdiction was conferred as soon as the order was made; but the Platte Circuit Court did not become possessed of the action until the papers were filed or some other action taken by the parties in said court.

The statute required or directed the Clerk of the Clay Circuit Court to make and transmit a transcript and the papers in the cause to the Platte Circuit Court or the clerk thereof, by the next term of the court, or if, for the causes stated in the statute, the clerk should fail to file the papers at the first term of the court, he was directed to transmit them by the next term. The filing of the papers was not to give the court jurisdiction of the subject matter of the action. The object of the Legislature was to insure a speedy trial; the jurisdiction was conferred by the order of the court changing the venue, and the filing of the papers in the court to which the venue had been changed was only one of the necessary steps to be taken in the progress of the cause. It is, however, contended, that if the papers were not filed in the office of the Clerk of the Platte Circuit Court, at or before the second term, the cause was necessarily discontinued. The statute does not say that the suit shall be discontinued if the papers are not filed by the second term. It only provides that the suit shall not be discontinued if they are not filed by the first term. We think the statute to be only directory. It directs a public officer to perform a duty devolved on him in a prompt manner, and in order to secure this promptness a pen-

alty is inflicted or provided for a failure in the officer to discharge the duty imposed. The court should see that the parties are not surprised or injured by the failure of the clerk to perform his duties, and if the papers are not filed until after the time fixed by law, the parties should be notified of the filing of the papers in time to prepare for the trial. But the time fixed for the filing of the papers is not so essential or imperative as to necessarily work a discontinuance where the law is not strictly complied with. The statute being only directory, if the parties, as in this case, appear and go to trial, it is sufficient. (Sedgw. Stat. & Const. Law., 372, 373; also 368 to 370 and cases there cited.) If the defendants had appeared in the Platte Circuit Court at the second term after the venue was changed, produced the order changing the venue, and filed their motion to discontinue the cause for the reason that no transcript had been filed, and the plaintiffs had then failed to file a transcript, it may be that the court would have been justified in dismissing the cause. But it seems that at the term of the Platte Circuit Court before the one at which the appellants filed their motion to dismiss, they had their witnesses subpoenaed and in attendance, and the cause was continued at the costs of the plaintiff.

Hence, defendants must have known that the case was there and that they were themselves accumulating costs in the case; and after their motion was overruled they agreed to go to trial, consented to discharge a jury that had been sworn in the case, and agreed to a trial before the court. It is therefore too late now to raise the objection that they and the cause were not properly in court. (Gilstrap vs. Felts, 50 Mo., 428; Street vs. Chapman, 29 Ind., 142; 5 Blackf., 21.) The court did right to permit the plaintiff to have the transcript properly certified by affixing the seal of the Clay Circuit Court to the certificate of the Clerk.

It is also insisted by the appellants that the court erred in refusing to permit James Henderson, Sr., at the close of the evidence to file a supplemental answer. This was a matter for the discretion of the court under the circumstances of the

case. The facts discovered, which it was proposed to set up in the supplemental answer, could have been discovered by ordinary diligence before the commencement of the trial; and the defendant had already filed an answer in which he had wholly disclaimed any interest whatever in the land in controversy, so that it cannot be seen how he could be benefited by the answer he offered to file. The court therefore properly refused to permit the supplemental answer to be filed. (*Harrison vs. Hastings*, 28 Mo., 346.)

It is further insisted by the appellants that the Circuit Court, wrongfully permitted the plaintiffs to prove the contents of the deed of the sheriff of Clay county, to plaintiffs, after proofs that it had not been recorded and was lost. This evidence was objected to, on the ground that it was stated in the petition, that the deed was recorded and filed with the petition in the cause. It is sufficient to say that the evidence shows that the deed was filed with the petition, and afterwards lost from the papers, and could not be found. The allegation in the petition, that the deed had been recorded was wholly immaterial, and did not preclude the plaintiffs from proving that it had not in fact been recorded, and that no copy could be procured.

It was further objected to the evidence of the contents of the deed that the law required the deed to be acknowledged in open court, and the clerk was required to enter the acknowledgment upon the records of the court, and that this entry would be better evidence of the contents of the deed, than any parol evidence could be. The entry made by the clerk of the acknowledgment of the deed formed no part of the deed. The entry of the acknowledgment on the deed is what formed a part of the deed, and upon which the plaintiffs must rely for their title to the land. The entry made by the clerk upon the record could not even have been resorted to by plaintiffs as evidence to perfect the deed, if the entry on the deed had been defective, and of course could not have been substituted for the entry made on the deed. Hence it follows that parol evidence was properly resorted to. (*Smith vs.*

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Philips, 25 Mo., 555; Newman vs. Studley, 5 Mo., 291; 1 Greenl. Ev., § 84, note 2, §§ 509, 560.) And if the entry made by the clerk upon the record is not correct, that fact would not affect the deed. (Scruggs vs. Scruggs, 41 Mo., 242; Crowley vs. Wallace, 12 Mo., 143.) The objection made by the appellant that it was not shown, that the sheriff's deed was stamped, was not made in the Circuit Court, and will not be noticed here.

The remaining ground for the reversal of the judgment of the court below is, that the judgment is not sustained by the evidence, and therefore that the judgment should have been in favor of the defendants upon the merits of the case. The ground for relief relied on by the plaintiffs in the petition is, that James Henderson, Sr., was, at and before the 24th day of July, 1860, indebted to one William W. Henderson as administrator of the estate of George Henderson, deceased, in the sum of six thousand five hundred dollars, together with interest at the rate of ten per cent. per annum, from the first of June, 1856, which was evidenced by his promissory note of that date; that in order to defeat, and hinder and delay the collection of said debt, he attempted to dispose of his property including the land in controversy; that in order to place his property beyond the reach of this creditor, he contracted a number of either real or pretended debts, and with the pretended view of securing these last named debts, he, on the 24th day of July, 1860, conveyed the land in controversy by a deed of mortgage with a power of sale to David M. Rivers, and others therein named; that the debts pretended to be secured, if real debts, were contracted with the fraudulent intent to hinder and delay the said William W. Henderson in the collection of his said debt; that in the creation of the debts pretended to have been secured by said mortgage, the said James Henderson, Sr., acquired a large amount of property which was disposed of by him, and the money received therefor, together with other monies, then had by him, was placed in the hands of his three sons, and co-defendants, George, James A. and Washington Henderson, and

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pursuant to said fraudulent intent to hinder and delay the collection of said debt, due to William W. Henderson as administrator, he procured the land in controversy to be sold under and by virtue of said mortgage deed, and conveyed to his said three sons; that whatever money was paid for said land at said pretended sale to his said sons, was the money of said James Henderson, Sr. Wherefore, it is charged, that the deed conveying said land to said George A., James A. and Washington Henderson, was fraudulent and void, as to said William W. Henderson, who was a creditor as aforesaid, and that plaintiffs, having purchased all of the right or title of the said James Henderson, Sr., in and to said land, under and by virtue of an execution issued on a judgment obtained against said James Henderson Sr., on the debt in favor of William W. Henderson aforesaid, have a right to avoid said deed to the three sons, and hold the land free from any claim or right on their part by virtue of their said deed. These charges of fraud and fraudulent intent were denied by the defendants.

From the evidence presented in the bill of exceptions, it appears that James Henderson, Sr., who is the father of the other defendants, was in the months of June and July, 1860, indebted to some fifteen or sixteen persons living in Clay County Missouri, in the aggregate sum of about eleven thousand dollars, the most of which debts were contracted in said months of June and July, 1860, for mules; that he at or about that time, took to the State of Kentucky, the mules numbering from 75 to 100; that he was then indebted to the said William W. Henderson in the sum before stated; that after having disposed of the mules taken to Kentucky, James Henderson, Sr., returned to his residence in Clay county, Missouri, in July, 1860; that about the time he started to Kentucky with the mules, a letter was received from the attorney of William W. Henderson, addressed to James Henderson, Sr., Clay county Mo., to which the defendant Washington Henderson the oldest of the three sons wrote the following reply:

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"Liberty, Clay County, Missouri, June, 18th, 1860.

"Cousin Will: I received a letter for my father from Mr. Coleman of St. Louis, yesterday, stating that he had father's note that you had given him for collection. Father is at this time in Kentucky and will not be at home for a month or six weeks; but he expects to see you as he returns; but, if he should not, he will write or come and see you as soon as he comes home, and I will ask you if you please to not force us to pay the whole amount right away. The amount is much larger than I had any idea that my father owed, and I hope you will have mercy, and give us a chance to pay you, without sacrificing what little we have got, and have worked so hard to get from our childhood to the present time; and if God gives health and strength we will continue to work until you are paid, and that shall be as fast as we can make it. We have a hard and slow way of making money, but I pray God to spare me to see the day that we will owe no man anything. Write to me as soon as you receive this please.

Respectfully, W. A. Henderson."

On the same day Washington A. Henderson wrote to the attorney Coleman, as follows:

"Mr. Coleman, Dear Sir: I received your letter to my father yesterday, and he is in Kentucky at this time. When he comes home he will act in the matter, and I ask you if you please to wait until you hear from him. I sent a letter to cousin Will Henderson to day, directed to St. Louis, and if his post office is not that, I wish you would do me the favor to see that he gets it."

On the 25th day of September, 1860, James Henderson, Sr., forwarded to Coleman a letter in the handwriting of his attorney, Thos McCarty, as follows:

"Dear Sir: Yours of the 19th inst. is before me, containing a proposition, from William Henderson, as the administrator of his father's estate. With every disposition on my part, to do all I can towards a settlement of the matter, I find it impossible to accept the proposition, and therefore notify you at once, that I decline acceding thereto, in order that you

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may be prepared to take such course in the premises as duty and the law requires."

The evidence further shows that James Henderson, Sr., executed a note to one George E. Claybrook, in Clay county, Missouri, on the 28th day of June, just ten days after the date of the letters written by Washington Henderson to Will Henderson and Coleman; and the evidence also tends to show, that James Henderson, Sr., started to Kentucky with his mules on the 28th day of June, 1860. It is further shown, that Henderson, Sr., returned from Kentucky in July, 1860, and at once began to arrange with his creditors in Clay county, to give them a mortgage to secure his indebtedness to them. His creditors, all who were examined, state that they were not pressing him for their money, but that he voluntarily proposed to give them a mortgage on his land and other property; that he visited a number of them and requested them to have their debts put in the mortgage, telling one of them that he wanted to give the mortgage; that "he might be sued on an unjust debt," and suggested putting the witness' debt in the mortgage. All of the notes of the home or Clay county creditors were sent to Thomas McCarty of Liberty, who was retained as the attorney of Henderson in reference to the debt of William W. Henderson. On the 24th day of July, a mortgage was executed by James Henderson, Sr., by which he conveyed to five or six of his creditors two hundred and fifteen and one-half acres of land (the land in controversy), together with his personal property, to secure the debts in Clay county, amounting to about eleven thousand dollars. This mortgage contained a power of sale, by which it was provided, that if the debts were not paid by the 1st day of January, 1861, the mortgagees could give twenty days' notice and sell the property. On the same day another mortgage was executed to G. W. Morris, to secure a debt of five hundred dollars. The first named mortgage included the land in controversy as well as a negro woman, horses, mules, oxen, cows and calves, hogs, fifty barrels of corn in the crib, a stack of oats, wagons, wagon harness and plow gear.

Immediately after the first of January, 1861, the property mortgaged was advertised for sale under the power in the mortgage. The notes, to secure which, the mortgage was executed, were all placed in the hands of McCarty, the attorney employed or consulted by Henderson, Sr., in the suit on the note of W. W. Henderson. The sale took place on the 30th day of January, 1861. The most of the creditors provided for in the mortgage were present at the sale; some of them purchased portions of the personal property, but none of them bid on the land. The land with other portions of the personal property was purchased by the three sons of James Henderson, Sr., and in fact the mortgagees not only sold the property conveyed by the mortgage but they sold seven plows, which were also purchased by the three sons of Henderson, Sr. There was but one bid on the land; that bid was ten dollars per acre, for which the land was sold to the boys. The whole amount of the sale was \$3807.95: Of this the boys purchased to the amount of \$2397.55, and the creditors and others, to the amount of \$1430.40. The evidence shows that the land was at the time worth from \$3,300 to \$5000. The creditors who were examined as witnesses, and whose debts were secured by the mortgage, gave as a reason for permitting the land to be sold to the boys for less than its value without bidding thereon, that they considered their debts good, did not want land; that they had confidence in the boys and in the old man; believed the old man was good for his debts; and one of them stated that he had been assured, by a confidential friend, that his debt would be paid. The evidence further shows that James Henderson, Sr., with his wife and his three sons (the other defendants), previous to and at the time of making the mortgages resided on the land in controversy; that it was a finely improved farm, with a good brick dwelling house, a good barn, and other out-houses; that the business was all done in the name of the old man, up to the time of the sale under the mortgage; that since the sale, the business has been done in the name of the boys; but that the family otherwise

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reside on the farm since the sale, just as they did before, and that the old man is still so in possession, one of the boys lately having moved to Nebraska; that no money was paid by the boys for their purchases at the sale made under the mortgage, but the land was conveyed to them, by the mortgagees, and they on the 11th day of February, 1861, re-conveyed the farm land by deed of mortgage to a part of the original mortgagees whose debts thus secured amounted to \$4553, which was not all paid until 1864 or 1865; the old man paying part of the money as agent of the boys. It was further shown, that William W. Henderson as the administrator of the estate of George Henderson, deceased, commenced a suit in the Clay Circuit Court, against James Henderson, Sr., on the 6th day of October, 1860, on the note for \$6500, executed to George Henderson in his life-time, and dated June 1st, 1856; that on the 27th day of October, 1860, the defendant in said suit (James Henderson, Sr.) appeared in the Clay Circuit Court, and obtained leave to file an answer in the case, thirty days before the next term of the court; that no answer was ever filed, but that afterwards on the 29th day of April, 1861, judgment was rendered, in the cause against defendant, for want of answer, for the sum of \$9525; that afterwards an execution was issued on said judgment, and the land in controversy levied on as the property of James Henderson, Sr., and sold by the sheriff to plaintiffs who received the sheriff's deed therefor.

On the part of the defendants it was shown in substance, that in June, 1860, James Henderson, Sr., the father of the other defendants, went to one Thomas McCarty, an attorney, and represented to him that he was involved in debt and desired to pay his home creditors. McCarty advised him, to make a mortgage on his property to secure the home creditors. After this, all of the notes of the home creditors were placed in the hands of McCarty, to be secured by a mortgage. The mortgage was made on the 24th day of July, 1860, the old man having previously given McCarty the names of all of his home creditors. It seems that Samuel Hard-

wick, an attorney of Liberty, was at the time controlling the \$6500, note of W. W. Henderson, upon which the judgment was afterwards obtained; that the creditors, secured by the mortgage, requested McCarty, about the first of January, 1861, to have the property named in the mortgage advertised and sold; that it was properly advertised and sold on the 29th day of January, 1861; that the sale was well attended; McCarty thought the land ought to have brought fifteen dollars per acre; that no arrangement had been made, between the creditors and the young Hendersons, previous to the sale about their becoming the purchasers of the land or other property; that after the sale an arrangement was made with a part of the creditors provided for in the mortgage, to give the boys time, if they would execute a new mortgage on the same land to secure them; that on the eleventh day of February, 1861, the three boys made a new mortgage by which they conveyed the land to a portion of the creditors who were willing to give time; that the amount of debts thus secured by the second mortgage was \$4553, which included the debt of five hundred dollars before secured to Morris by the old man, on the 24th of July, 1860; that all other debts secured by the original mortgage and not included in the new mortgage were paid at the time of the sale, and the witness stated, that they were paid out of money received for the personal property sold; that all of the notes secured in the original mortgage, had been preserved by McCarty, and that he then had them in order to show that the transaction was a fair one, if a controversy should arise. Witness McCarty, further stated, that he was requested to be present at the sale by old man Henderson, as well as some of the creditors; that he made out a sale bill of the property sold; that he could not say that he considered himself old man Henderson's attorney in that matter, that he was his attorney in the suit by William Henderson; that no arrangement was made with the boys previous to the sale to the effect that the creditors would take a second mortgage from them and continue to wait for their money; but that witness shortly after the sale

had a talk with the boys; they wanted to pay their father's home creditors, and an arrangement was then made with part of the creditors, to give the boys time, and to these creditors the boys gave their notes and a mortgage on the land purchased by them; that he did not represent old man Henderson at the sale strictly as an attorney, but was requested to attend the sale. One of the mortgagees, in whose name with others, the sale was made, was not present at the sale.

Other evidence was introduced to the effect that the boys owned eighty acres of land, in addition to the land purchased at the sale, and that they made money in raising and feeding hogs; that they sold some stock in 1861; that they received about \$2500, for feeding stock in 1863, and over four thousand dollars in 1864, twelve hundred dollars of which was paid to the old man. James A. Henderson, one of the defendants, was examined as a witness and stated that Washington (his brother), was twenty-five years old, and that he and Samuel were over twenty-one years old; that he paid some of the notes named in the second mortgage; that Washington paid some, did not know that his father paid any of them; that the creditors agreed with him and his brothers, that if they would pay their debts against the old man they would give them time; that no effort was made to his knowledge, to prevent persons from bidding at the sale; that there was but one bid on the land; that the last of the notes had been paid since the war; that he and his brothers concluded on the morning of the sale to bid for the land; they wanted to pay their father's debts, but their father did not know of their intention to purchase the land. It appears that he did not recollect that he or his brothers had any money; they expected that if they became the purchasers of the land they could borrow the money to pay for it. They had no knowledge that they could buy it on credit, until after the sale; could not say whether he knew that his father was sued by W. W. Henderson or not. His father took from 60 to 80 mules to Kentucky; could not say how many. He traded largely in 1860, but did not trade in 1862. His father settled

on the farm in 1854. All of the deeds and mortgages referred to, were read in evidence on the trial by the respective parties.

The question presented for the consideration of this court is: Was the Platte Circuit Court authorized, under the evidence in this case, to find that the deed of mortgage, made by James Henderson, Sr., to Harsel and others, conveying the land in controversy with his personal property, and the sale of the property by virtue thereof to his three sons, was a contrivance on the part of the old man to get his property out of his own name and in the name of the boys, with a view to hinder and delay W. W. Henderson in the collection of his debt against the old man, and thus to avoid and set aside the deed to the sons? Fraud will not be presumed when all of the facts in the case consist as well with honesty and fair dealing as they do with an intention to defraud. (*Dallam vs. Renshaw*, 26 Mo., 533; *Rumbolds vs. Parr*, 51 Mo., 592.) And in order to defeat the title of a purchaser from one who conveys lands with a fraudulent intent, the vendee must have notice of such intent or participate in the fraud. (*Chouteau vs. Sherman*, 11 Mo., 585.) And it may further be said, that there is no doubt that old man Henderson, finding himself unable to pay all of his debts at once, had the lawful right to pay some of his creditors in preference to others; but in doing so the transaction must be honest. He could not do so with the view or intent to deprive creditors not preferred, of all chance to ever be paid, or with a view to hinder and delay them in the collection of their debts. Such a conveyance might necessarily operate to delay creditors not preferred. But if the intention or view with which the conveyance is contrived and made, is to defeat particular creditors, then it is fraudulent as to such creditors. (*Drury vs. Cross*, 7 Wall., 299; *Tompkins vs. Wheeler*, 16 Peters, 106; *Sibly vs. Hood*, 3 Mo., 290; *Gales vs. Labaume*, 19 Mo., 17; *Cason vs. Murray*, 15 Mo., 378.)

Courts of equity will, in order to ascertain whether fraud existed or not in a particular case, look into all of the circum-

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stances surrounding the whole transaction, and if the transaction, when so considered, is inconsistent with fairness or honesty, it will be held to be fraudulent. In the case under consideration, we find old man Henderson in the month of June, 1860, purchasing mules in Clay County, Missouri, to be taken to Kentucky for sale. The evidence shows that at this time he was considerably indebted, and that among others he was indebted to W. W. Henderson as administrator of the estate of George Henderson, deceased, in the sum of \$6,500, with interest for several years; that on the 17th day of June, 1860, a letter was received from one Coleman, an attorney of St. Louis, in whose hands the note of W. W. Henderson had been placed for collection, requesting payment of the note. This letter was answered by Washington Henderson, one of the defendants, on the 18th of June, 1860, in which he urgently requested that his father should not be compelled to pay all of the note at once, or in his own words, that "we" shall not be compelled to pay it all at once; he states in this letter that his father was then in Kentucky, but would see to the matter as soon as he returned. There is other evidence that shows that the old man was in Clay County and gave a note for mules purchased on the 28th day of June, and that he on that day started for Kentucky, ten days after this letter was written. The old man returned from Kentucky in July, 1860, and soon after his return he went to a lawyer for consultation. He then stated that he was embarrassed with debts and wanted to pay his home creditors. None of these creditors were urging him to pay their demands. He went to these creditors, offered to give them a mortgage, telling one of them that he might be sued for an unjust debt, and suggested to him that he should have his debt put in the mortgage. It does not appear that any of the home creditors urged or desired the mortgage, but that the old man was anxious to give the mortgage and urged them to have their notes secured by the mortgage. The lawyer consulted had advised him to give the mortgage. The notes were all placed in the hands of this attorney, and on the 24th day of July, 1860, the mort-

gage was executed conveying the land in controversy as well as a large amount of personal property, including horses, colts, oxen, cows and calves, hogs, wagons, harness, a stack of oats, fifty barrels of corn, and even his plow gear. It seems that a correspondence was going on between old man Henderson and Coleman, the attorney of W. W. Henderson about this time, in reference to the settlement of the debt in Coleman's hands, and that McCarty, the lawyer previously consulted by the old man in reference to the giving of the mortgage, was also engaged by him in this business with Coleman; and that on the 25th day of September, 1860, James Henderson, Sr., procured his attorney to write a letter to Coleman in answer to one from Coleman of the 17th, in which he informs him that the debt to William W. Henderson would not be settled on the terms proposed, and that he might take such course in the premises as his duty and the law required. A suit was at once commenced in the Clay Circuit Court by William W. Henderson against old man Henderson on the note for \$6,500. In the latter part of October old man Henderson appeared in the Clay Circuit Court and obtained leave to file an answer in the action thirty days before the next term of the court, which was held in April, 1861.

No answer was ever filed, and judgment was rendered in the cause in April, 1861, for want of an answer. On the 29th day of January, 1861, a sale was made under the mortgage. At this sale, the three defendants, sons of old man Henderson, purchased the land at ten dollars per acre, and they also purchased a large portion of the personal property. The mortgagees not only sold all of the property named in the mortgage, but they sold some seven plows which were not named in or conveyed by the mortgage, which were purchased by the boys. The evidence shows that the land was worth fifteen dollars per acre, and some of the witnesses thought more; but the only bid for the land was ten dollars per acre, the creditors not bidding; some of them saying that they did not want land and that they considered their debts good. One of them stated in his evidence, that he had been assured by a

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confidential friend that his debt would be paid. The debts purporting to be secured by the mortgage were over eleven thousand dollars. The property sold brought, in the aggregate \$3,807 95-100. Of this amount the purchases of the boys amounted to \$2,377 55-100; that purchased by others, 1,430 40-100. The boys paid no part of the money for the purchases made by them; but a few days afterwards gave a mortgage on the land purchased to a part of the same creditors in the original mortgage to secure their debts, which amounted to \$4,553; and all other debts named in the original mortgage were paid at the time. It is said by one of the witnesses, that these debts were paid out of monies received for personal property sold; but it will be seen from the evidence, that all of the personal property sold to others besides the boys only amounted to a little over fourteen hundred dollars, while the debts paid at the time must have been over seven thousand dollars. It will thus be seen, that old man Henderson must have paid out, in payment of the debts named in the mortgage, over five thousand dollars at the time of the sale. Under this state of facts, what necessity was there for the sale of property under the mortgage? The debts secured by the mortgage being about eleven thousand dollars, between five and six thousand was paid at the sale, and must have been paid by the old man. About \$1,400 was received for personal property, and the balance of the creditors were willing to wait for their money, and did wait, taking a mortgage on the same land from the boys. Why was it necessary under these circumstances, for the old man to sell his plows to his sons, which were not named in the mortgage, and his plow gear, wagons and harness, which were in the mortgage? Why was it necessary to sell the little corn in his crib, his oats and stack, and his cows and calves? To my mind it is clear, that on the old man's part, the main object in executing the mortgage by him of the 24th of July, and in procuring the sale thereunder, was to defeat the collection of the debt to William Henderson as administrator of his father's estate.

The only remaining question is, had the boys or any of

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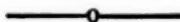
them notice of this fraudulent intention on the part of their father, or did they participate therein? Washington Henderson, the oldest of the boys and the one who answered the old man's letters in his absence, knew of the debt to William, the administrator, and urged the postponement of the collection; he purchased his father's property; he must have known that his father had money with which he paid the most of the debts secured by the mortgage, after the property was all sold under the mortgage. He was a purchaser at the sale of his father's plow-gear and his plows for a mere nominal sum. The old man still holds possession of the farm, while one of the boys has moved to Nebraska. The answers of the old man and the boys are not under oath. The circumstances of the case were sufficient to raise a very strong presumption of fraud against the boys, and of an intention to defeat the debt of William Henderson, the administrator. The facts of the case were within the knowledge of the old man and the boys, to show conclusively who it was that furnished the money to pay the debts secured by the last mortgage, and why it was that the sale under the mortgage, so far as the purchase by the boys was concerned, was entirely abandoned and all the debts of the old man paid at the time of the sale, except a little over four thousand dollars, which was secured by the mortgage given by the boys. The burden was thrown on them to show the fairness of the whole transaction, and yet only one of the boys was examined. At the trial the old man and the other two boys, and one of them the oldest, who it is shown attended to the old man's business in his absence, remain silent; are not examined at the trial, although there was nothing to prevent their examination, in which they could have explained the whole transaction and shown who it was who furnished the money that paid the debts and released the land, and what was done with the money received by the old man for nearly one hundred mules.

These things all being taken into consideration, although the evidence against the young men is not entirely clear, we cannot say that the Circuit Court did wrong in rendering a

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decree in favor of the plaintiff. (Sands vs. Carduise, 4 Serg. & R., 558-9; Lay vs. Lawrence, 8 Dana, 80.)

The judgment is affirmed. The other judges concur.



JOHN G. WOODS, CIRCUIT ATT'Y *ex rel.*, JARVIS G. ROGERS, Respondent, *vs.* WILLIAM HENRY AND F. M. KIMBALL, Appellants.

1. *Town, incorporation of—False description—May be stricken out, when—Amendment of records of County Court—Quo Warranto, etc.*—The town of Cameron was laid off and platted on part of Section 23, Township 57, Range 30, in Clinton county, and the plat was acknowledged and filed in the Recorder's office of the county, and the town was built up and inhabited. In 1867, a petition of its inhabitants to the County Court for incorporation referred to the metes and bounds as set out in the plat, but falsely described the location of the town, as in section 24, in which no traces of a town existed. The order of incorporation made by the County Court under the statute similarly mis-described the location.

In *quo warranto* to oust the trustees of the corporation. *Held*, 1st. That enough remained in the description without the false particular, to ascertain the location; and that such false description should be stricken from the order. 2nd. That the records of the court need not be amended so as to describe the location as in sec. 23.

2. *Town—Act incorporating amendable at subsequent term.*—The order of a County Court made under the statute, incorporating a town, is rather a legislative than a judicial act, and may be corrected at a subsequent term.

3. *County—Area diminished below 500 sq. miles, etc.*—An act of the legislature, diminishing the area of a county below five hundred square miles, is unconstitutional and may be treated as null and void by the County Court.

Appeal from Clinton Circuit Court.

J. G. Woods, J. F. Harwood, and Chandler & Sherman,
for Respondent.

I. The court will take judicial notice of county boundaries. (State vs. Worrell, 25 Mo., 212; Hineckly vs. Beckwith, 23 Wis., 328; Mossman vs. Forrest, 27 Ind., 233; Indianapolis R. R. Co. vs. Stephens, 28 Ind., 429; Woodward vs. Chicago & R. Co., 1 Wis., 309; Martin vs. Martin, 51 Mo., 366.)

II. The statute of this State requires the metes and bounds of a municipal corporation to be stated in the order of the court creating the corporation. (Gen. Stat. 1865, p. 240, § 1; Dill. Mun. Corp., 124.)

III. Any ambiguity or doubt arising out of the terms of the order, must be resolved in favor of the public. (Dill. Mun. Corp., 103; Minton vs. Lane, 23 How., [U. S.] 435-6, 8 Conn., 247; 10 Conn., 442.)

IV. The order of the County Court of Clinton county, incorporating the inhabitants of the town of Cameron, is conclusive of the metes and bounds of the corporation and of the location and extent of the territory thereof, and no evidence of antecedent facts is admissible to change or explain the said order. (State vs. Weatherby, 45 Mo., 17; 12 Barb., 573.)

E. H. Norton, for Appellants.

ADAMS, Judge, delivered the opinion of the court.

This was an action in the nature of *quo warranto*, to oust the defendants from their offices as trustees of the town of Cameron, in Clinton county, Missouri. The Circuit Court decided in favor of the plaintiff, and entered a judgment of ouster, from which the defendants have appealed to this court.

The leading facts are, that the town of Cameron was laid off and platted on part of section 23, of township 57, of range 30, in Clinton county, and a plat of the town thus laid off was duly acknowledged and filed in the Recorder's office of Clinton county. The town as thus laid off was built up and inhabited, and was the only town of that name in Clinton county. The inhabitants of this town in the year 1867, applied to the County Court of Clinton county, to be incorporated according to the statute in such cases made and provided; and in their petition for the metes and bounds of the town, referred to the plat on file in the recorder's office, but falsely stated its location to be in section 24, instead of section 23, of township and range aforesaid. The Act of

incorporation was passed by the court and entered of record, whereby the town of Cameron was incorporated; but in this act of incorporation the town is falsely described as located on section 24, instead of the real place section 23, township and range aforesaid. Some years afterwards, the attention of the County Court was called to the false particular in the description of the town of Cameron, and the court corrected the entry by ordering section 23, to be inserted instead of section 24.

The main point raised and discussed here is, that the false particular denoting the location of the town to be on section 24, controls every other particular demonstrating the real locality, and therefore renders the act of incorporation absolutely void, so far as the real town of Cameron is concerned.

It is conceded that there was no town in section 24, but the town was in section 23., and that the plat referred to, demonstrates the existence of the town as being in section 23. In the construction of records as well as deeds, we must look to the whole record and to all the papers referred to in connection with it, if necessary to ascertain its true intent and meaning. Here the town of Cameron, was incorporated as it stood upon the ground: Where did it stand? Where was it located? We find it actually laid off, and built up and inhabited, on section 23, and no trace of any town existed on section 24. Then to what does this act of incorporation apply? Certainly to the town of Cameron, as found upon the ground. It is found on section 23, and not on section 24. Therefore section 24, whenever it is referred to in the papers and order of the court, is a false particular which must be struck out; and when so struck out, enough is left to ascertain the precise location of the town.

It was not necessary to amend the County Court record, to demonstrate the exact location of the town of Cameron; the record as it stood, sufficiently pointed out the location. The town itself was an actual entity on the ground, and as well defined and no doubt better known, than the numbers of the United States surveys of the public lands. The act

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of incorporation however, as passed by the County Court, was not a judicial act, or in the nature of a judicial act, which could not be amended or corrected at a subsequent term, so as to correspond with the original purpose. It was more in the nature of a legislative or administrative, rather than a judicial act.

The point is raised here, that the town of Cameron is not and was not at the time it was incorporated, within the boundaries of Clinton county. It is admitted, that prior to the General Statutes of 1865, this town was in Clinton county, but that by an extension of the boundaries of De Kalb county, a part of Clinton county was cut off, and this town was thereby thrown into De Kalb county. As the court will take a judicial notice of the boundaries of counties, it will also take judicial notice whether an act of the legislature cutting off part of a county reduces it below its constitutional limits. The constitutional limits of counties under the present constitution, are five hundred square miles; under the old constitution, the limits were four hundred square miles. The county of Clinton was made prior to the new constitution, and as it stood when the new constitution was framed, it did not have five hundred square miles.

The Act of the legislature therefore, which is comprised in the General Statutes, diminishing the boundaries of Clinton county must be regarded as unconstitutional, and the territory cut off still belongs to Clinton county.

So in any view we can take of this case, there is no foundation for this proceeding. The judgment must therefore be reversed.

Judgment reversed. Judge Vories not sitting. The other judges concur.

State, ex rel. v. Lankford.

STATE OF MISSOURI, *ex rel.*, Public Admr. of DAVIESS COUNTY,
in charge of estate of JOHN C. LANKFORD, deceased, Plain-
tiff in Error *vs.* THOMAS LANKFORD, Defendant in Error.

1. *Administration—Annual settlements—Prima facie evidence—Suit on administrator's bond.*—Annual settlements, up to the time of making the final settlement by the administrator, are not final nor conclusive upon the parties interested, but only afford *prima facie* evidence of the facts therein contained, and are subject to be reviewed by the courts in a suit on the bond of the administrator.

Error to Daviess Circuit Court.

James McFerran, for Plaintiff in Error.

I. The annual settlements made by the administrator, were not judgments, and constituted no defense or impediment to a suit upon the bond, for breaches of its conditions. (*Picot vs. Biddle's Admr.*, 35 Mo., 35, and cases therein cited; *State to use, etc. vs. Flynn*, 48 Mo., 413.)

J. H. Shanklin, Mill. Ewing and M. A. Low, for Defendant in Error.

I. A person seeking to falsify the allowances and accounts of the settlements of administrators must petition the Circuit Court, as a court of law and equity, for that purpose. (*Jones vs. Brinker*, 20 Mo., 87; *State to use, etc. vs. Roland*, 23 Mo., 95.)

II. Annual settlements of an administrator are adjudications of a court of competent jurisdiction, which may be corrected and adjusted, it is true, by the same court on final settlement, yet they cannot be attacked, or surcharged, or falsified, in a suit at law on the administrator's bond. (*State to use, etc. vs. Roland*, *supra*; *Jones vs. Brinker*, *supra*; *Oldham vs. Trimble*, 15 Mo., 225; *Mitchell vs. Williams*, 27 Mo., 399.) In the two last cases there is nothing to indicate that the settlements were other than annual settlements. In the case of *Mitchell vs. Williams*, *supra*, the court refers to the settlement in the plural number, and no distinction is made in the method of surcharging and falsifying them.

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VORIES, Judge, delivered the opinion of the court.

This action was brought by the administrator *de bonis non* of the estate of John C. Lankford, deceased, against the defendant, one of the sureties on the administration bond of the former administrator. The petition is in the usual form, setting forth the administration on said estate by one Thomas J. Singleton, the execution of a bond by him as such administrator, and that defendant had executed the bond as surety; that Singleton had since died, and that the relator had been duly appointed administrator *de bonis non* of said estate, &c. After the formal parts of the petition, the plaintiff set forth and assigned several breaches of the bond sued on, among which was the following: "Plaintiff states and assigns as breaches of said bond and the condition thereof, that the said Thomas J. Singleton, as administrator of the estate of John C. Lankford, deceased, did not faithfully administer said estate, account for, and pay and deliver all monies and property of said estate, and perform all other things touching said administration as required by law, or the order or decree of any court having jurisdiction, in this; that is to say; that at the second annual settlement of said estate by the said Thomas J. Singleton, as administrator of said estate, with the Probate Court of Daviess county aforesaid, said court having jurisdiction and charge of said estate, on the 5th day of March, 1863, the said Thomas J. Singleton, as administrator of said estate, had in his hands and was indebted to said estate, of the assets thereof, for the sum of four hundred dollars, and being so indebted for the assets thereof, he, the said Thomas J. Singleton as administrator of said estate, then and there received a credit and allowance, by fraudulent and false means and pretenses, unjustly, to the injury of the estate of the said deceased, and parties interested in his said settlement, against said estate for the sum of four hundred dollars, on account of Sarah J. Lankford's receipt of a slave, Mary, when, in truth and fact, the said Thomas J. Singleton had never been charged, as administrator or otherwise, in any of his settlements of said estate, with said slave or her value, or any

part thereof, and was not entitled to said credit, or any credit against said estate on account of said slave or her value, and which sum of four hundred dollars, so due by said Singleton to said estate at said settlement, is still due and unpaid, and has never been accounted for by said Singleton or his legal representatives, or the defendant or said Milton H. Moore (the other surety on the bond), or either of them, to said estate or parties interested, or the plaintiff or this relator or either of them; by which the plaintiff has been damaged to the amount of four hundred dollars, with interest on the same from the said 5th day of March, A. D., 1863."

There were several other breaches of the bond assigned in the petition, but it is not necessary to set them out herein, as the one already set forth is sufficient to present the principle or question involved in the decision of the case. The defendant appeared, and filed his motion to strike out the first, second, third and fifth breaches assigned in the petition, (the one before set forth being the first) on the ground: 1st. "That said several assignments of breaches are irrelevant and redundant." 2nd. "That they tender issues which cannot be tried and determined in a suit on an administrator's bond." 3rd. "That they seek to set aside the adjudications of a court of competent jurisdiction and to recover in damages." 4th. "That they seek to contest in a collateral proceeding the adjudications of a court of competent jurisdiction." 5th. "That they are obnoxious to the objection of duplicity." This motion was heard by the court and sustained, and said breaches stricken out of the petition.

The plaintiff then suffered a non-suit with leave to move to set the same aside. In due time the plaintiff filed a motion to set aside the non-suit so suffered, which motion was overruled by the court, and the plaintiff excepted and appealed to this court.

It will be seen from the statement of this case, that the only question presented for the consideration of this court is as to the propriety of the action of the Circuit Court in striking out the breaches from the plaintiff's petition objected to

by the defendant. It is contended by the defendant, that the breaches were properly stricken out; that said breaches sought to surcharge and falsify the annual settlements of the administrator, and that that can only be done by a petition in the Circuit Court in the nature of a bill in equity to have the settlements set aside on the ground of fraud or mistake. The question as to what force and effect is to be given to the annual and final settlements of administrators, made in the courts having probate jurisdiction during the course of their administration, has been several times before this court, and the subject fully discussed. In the case of *Oldham vs. Trimble*, 15 Mo., 225, it was held, that, where a final settlement has been made and a suit at law afterwards brought on the administrator's bond, the settlements could be interposed as a defense to the action, but that the settlement might be opened and corrected in equity for fraud, after which a suit might be brought on the bond. To the same effect are the cases of *Jones vs. Brinker*, 20 Mo., 87; *Tourville vs. Roland*, 23 Mo., 95; *Mitchell vs. Williams*, 27 Mo., 399. It will be noticed in all of these cases, that final settlement had been made of the affairs of the estate, in which case the annual settlements had become merged in the final settlements, although no point seems to have been directly made on that fact.

In the subsequent case of *Picot vs. O'Fallon*, 35 Mo., 29, the administrator had attempted to make a final settlement of the estate upon which he had administered. The heirs and distributees appeared in the probate court in which the settlement was being made, and insisted that errors and omissions had been made in the previous annual settlements of the administrator, which they insisted should be corrected in the final settlement then being made. This was refused by the probate court, and an appeal was taken to the Circuit Court. In the Circuit Court the case was referred to a referee, who was directed to examine into the final settlement made in the probate court, and into no other proceedings, thus precluding the referee from any inquiry into the previous an-

nual settlements, taking the ground that the annual settlements had the force of judgments, and were final between the parties interested. After judgment the case was appealed to this court, where all of the authorities on the subject, both in this State and elsewhere, were carefully examined, after which it was held by the court, that when final settlement is made, all of the previous annual settlements are merged in the final settlement, and that they then become final and conclusive; but that until final settlement is made, the annual settlements are not to be considered as final adjudications and conclusive on the parties, but are only *prima facie* evidence of the matter therein contained.

In the case of Baker vs. Schoeneman, 41 Mo., 391, the decision in the case of Picot vs. O'Fallon was approved. The learned Judge delivering the opinion using this language, "we concur fully in the opinion that such settlements have not the force and effect of judgments, and are not conclusive against the persons by whom they are made, nor any other parties interested in the estate. We apprehend that in all of the cases determined by this court, whenever settlements have been referred to as having the effect of judgments, they were final and not annual settlements."

There is no doubt but an administrator *de bonis non* may sue the sureties on the bond of the former administrator before any final settlement is made; in fact in a case like the one under consideration where the first administrator is dead and his representatives neglect to make any final settlement, there is no other adequate remedy but a suit on the bond. (State vs. Flynn, 48 Mo., 413.) It would seem from the authorities above referred to, that annual settlements up to the time of making the final settlement by the administrator, are not final or conclusive on the parties interested, but that they only afford *prima facie* evidence of facts therein contained, and are subject to be reviewed by the courts in a suit on the bond of an administrator. It follows that the Circuit Court erred in striking out the breaches assigned in the petition in this case.

The judgment will therefore be reversed, and the cause remanded. The other judges concur.

Burt v. Rynex, et al.

WILLIAM BURT, Defendant in Error, *vs.* W. H. AND
ADELE RYNEX, Plaintiffs in Error.

1. Judgment affirmed.

Error to Linn County Court.

A. W. Mullins, for Plaintiffs in Error.

G. D. Burgess, and Geo. Easley, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

This case was here on a former occasion and will be found reported in 48 Mo., 309. The judgment was then reversed, because it did not appear what was done with the three hundred dollars, alleged to have been paid by Mrs. Rynex at the sheriff's sale and credited on the execution. We held that if the money was paid, and went in satisfaction of the plaintiff's debt, he could not recover the land and keep the money besides. But upon the last trial this omission was rectified, and the court rendered a decree in conformity with the decision of this court. The new testimony did not in the least change the case from what it was when it was first tried. The depositions of the defendants are vague, indefinite and negative, and fail entirely to meet the allegations of the petition, and the proofs submitted by the plaintiffs.

The fact still stands forth, that Grill, who was the agent of the plaintiff, acted in bad faith towards him and perpetrated a fraud on him to obtain his property at a sacrifice; that he bid in the property for Mrs. Rynex, one of the defendants, who was his sister, and had the deed taken to her. He was then acting as her agent, and notice to him was notice to her.

There was an utter want of fair dealing exhibited in this transaction, and the judgment of the court below must be affirmed. The other judges concur.

Henry v. Gibson, et al.

JAMES HENRY, Plaintiff in Error, *vs.* WILLIAM GIBSON, MICHAEL COLLINS AND THOMAS R. SHAW, Adm'r of JOSEPH ALEXANDER, deceased, Defendants in Error.

1. *Judgment—Execution—Motion to quash, etc.—Judgment by mistake entitled as against defendants not served, etc.*—Where plaintiff's petition alleged the indebtedness of A. B. & C., and prayed judgment against them, and judgment by clerical mistake was entitled as if against all three; but summons was served and judgment rendered and execution issued, against A. only, motion to set aside the judgment and quash the execution on the ground that the suit was now dismissed as to B. and C. would be error. Even if the judgment were irregular, A. could not take advantage of the error when he gave his own consent thereto.
2. *Judgment against one of defendants virtually a dismissal as to the remainder, when.*—Even where all the defendants in a suit are brought into court, judgment taken by agreement against one only would be tantamount to a dismissal as to the others.
3. *Judgment by request to perfect appeal.*—Where a party requests the court to render final judgment against him, merely *pro forma*, for the purpose of perfecting his appeal to the Supreme Court, such course will not prejudice his rights.

Error from Daviess Common Pleas.

James McFerran, for Plaintiff in Error.

I. The mere filing of the petition entitled against the other parties, without summons, service, or appearance, did not constitute the commencement of a suit against them. Hence, no dismissal as to them was necessary. (See 52 Mo., 332; 34 Mo., 326; 32 Mo., 423.)

II. The judgment being taken by agreement of the parties with a stay of execution for a definite period, the defendant is estopped from setting up the pretended irregularity.

M. A. Low, for Defendants in Error.

I. Plaintiff instituted suit against all of the defendants by filing his petition against them.

II. It was irregular to take judgment against one defendant without finally disposing of the case as to the other defendants, for there can be but one final judgment in a cause. (2 Wagn. Stat., 1053, § 8; Dow vs. Rattle, 12 Ill., 303; Davidson vs. Bond, 12 Ill., 84; Davis vs. Tiernan, 2 How. [Miss.],

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786; Dennison vs. Lewis, 6 How. [Miss.], 517; Hughes vs. Evans, 4 Sm. & M., 737; O'Hara vs. Lanier, 1 B. Mon., 100; Warren vs. Lewis, 1 B. Mon., 119; Appleton vs. Jacoby, 9 Dana [Ky.], 206.)

SHERWOOD, Judge, delivered the opinion of the court.

The plaintiff filed his petition in the Common Pleas Court of Daviess county, and alleged in such petition that the three defendants above named were indebted to him on a certain promissory note therewith filed, and judgment was prayed against them. Summons was, however, sued out and served on only one of the defendants, Joseph Alexander, who appeared, and by his consent, judgment was rendered against him alone; but the judgment was by a mere clerical mistake, entitled as if against all the defendants. At a subsequent term, Alexander filed his motion to set aside that judgment and quash the execution issued thereon, on the ground that the judgment was rendered against Alexander alone, without dismissing as to the other defendants. The execution was issued only against Alexander, and in every respect conformed to the judgment rendered. The court sustained this motion, set aside the judgment and quashed the execution, and in so doing it committed manifest error. No suit had ever been brought against any one except Alexander, nor judgment rendered, nor execution issued against any party besides him.

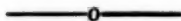
The mere filing of the petition, alleging the indebtedness of all the makers of the note, did not of itself make them parties to the action; as with the exception of Alexander, there was no summons issued or served on any one, nor any voluntary appearance (2 Wagn. Stat., p. 1006, § 1); and even if there had been as to the others the issuance and service of summons or a voluntary appearance, the judgment being taken by Alexander alone by agreement, would have been tantamount to a virtual dismissal as to those against whom no judgment was rendered.

But conceding that there was an error or irregularity in the proceedings, it did not lie in the mouth of Alexander to assert

it by seeking to vacate a judgment, to the rendition of which he had yielded his assent.

There is nothing in the point, that the plaintiff requested the court to render a final judgment against him when his motion for a re-hearing was overruled and his cause was dismissed for want of prosecution, as this judgment was evidently asked in order that the cause might be in the proper condition to ask redress in this court.

Judgment reversed and cause remanded. All concur



THE CITY OF ST. JOSEPH, Appellant, *vs.* CHARLES W. DAVENPORT, Respondent.

1. *St. Joseph, city of—Act amendatory of charter—Recorder—Appeal from judgment of—Trial de novo.*—The act to amend the charter of St. Joseph. (Adj. Sess. Acts, 1863-4, p. 432,) authorizes appeals from the judgments of the recorder in the same manner and to such courts as in case of appeals from justices of the peace (§ 7 p. 435). *Held*, that the appellate court is authorized to hear and try the cause *de novo*. (Boggs vs. Brooks, 45 Mo., 232.)

Appeal from Buchanan Circuit Court.

Chandler & Sherman, for Appellant.

I. The appeal in the case at bar has the effect of *certiorari* and none other. (County of St. Louis vs. Lind, 42 Mo., 348; Lacy vs. Williams, 27 Mo., 280; Lewis vs. Nuckolls, 26 Mo., 278; County of St. Louis vs. Sparks, 11 Mo., 202.)

Boggs vs. Brooks, (45 Mo., 232) is not in conflict with the appellant's position. There the act expressly refers to a "trial anew;" no such language occurs here.

B. F. Loan, and Strong & Hedenburg, for Respondent.

I. The act authorizes a trial *de novo*, in the appellate court. It declares, sec. 7, "that the appeal shall be in the same manner, and to such courts as appeals are allowed from judgments of justices of the peace."

NAPTON, Judge, delivered the opinion of the court.

This case presents only a single question, depending for its solution upon the construction of an act of the legislature approved Feb. 5th, 1864, entitled "an act to amend the charter of the City of St. Joseph." After providing for a publication of the delinquent list of taxes and apportionments due the city, the 4th section provides for a delivery of this list by the collector to the recorder of the city, accompanied with the collector's affidavit that it is a true statement of the unpaid taxes due the city, and properly apportioned on the real estate therein named; and it is also required to be accompanied with proof of the publication of notice in the newspaper as required in former sections. The recorder is then, after a certain lapse of time, authorized to receive testimony in regard to the proper levying, apportionment and delinquency of the taxes, and persons interested are allowed to appear and contest these matters, and then the recorder is authorized to render a general judgment against the whole or such part of the real estate, and the owners thereof, known or unknown, upon said list, as in his opinion the said city shall be entitled to, with interest and a penalty and costs, and such general judgment shall be considered and held as a separate judgment, as regards each distinct piece of real estate and the taxes and apportionments against it. This judgment is then declared valid and binding, and the exact form in which the recorder is ordered to render it, is given in the act, and it is declared conclusive evidence of the regularity and correctness of the levying of the taxes, and making the apportionments therein mentioned, and that the same as therein stated, are due and unpaid, and also of all proceedings in reference to said taxes and apportionments prior to the rendition thereof, with this proviso: "That any person directly interested in any real estate, against which a judgment has been so rendered, may appeal from said judgment, so far as the same concerns any of the real estate in which he has an interest, within ten days from the date thereof, and in the same manner and to such courts as appeals are allowed

from judgments of justices of the peace in civil cases, and provided also, that the party so appealing, shall pay to the recorder the costs of a transcript at the same rate that justices of the peace are allowed for transcripts; and such transcript shall only contain so much of the record in the cause as applies to the real estate of the party appealing; and provided further, that if said party so appealing shall not prosecute his appeal with effect and without delay, the appellate court shall affirm the judgment of the recorder with costs, and with a reasonable fee for the attorney of the city which shall be included in the judgment of such appellate court; which said judgment so affirmed shall from date bear interest at the rate of ten per cent. per annum, and shall be a special lien upon the real estate, &c., and shall be collected as other special judgments of such appellate courts are."

The 8th section of the act also gives this right of appeal to the attorney of the city in the same terms as previously given to the owner of the land, but exempts the city from giving bond, and further requires "that no more of the record be set out in the transcript by the recorder, than may be necessary to try and determine the question in controversy," and if the appellate court shall upon hearing the case reverse the judgment or render judgment in favor of the city, the same shall be with costs, and also with such additional cost and the penalty and interest, as the said recorder is required by law to include in his judgment in favor of the city; and said judgment of the appellate court shall bear the same interest from date, have the same legal effect and be collected in like manner as other judgments of appellate courts under this act."

The question is whether the appeal allowed by this act operates simply as a *certiorari* and only invests the Circuit Court with a power of review of what appears in the record, or as in appeals from justices' courts, authorizes a trial *de novo*.

It must be conceded that the intention of the legislature in allowing appeals from the recorder, is not very clear. Un-

der several decisions of this court it seems to have been settled, that a mere appellate jurisdiction, does not authorize a new trial in the appellate court ; but that the appellate court merely reviews what appears on the face of the record. (County of St. Louis vs. Sparks, 11 Mo., 282 ; Lewis vs. Nuckols, 26 Mo., 279 ; Lacy vs. Williams, 27 Mo., 281.) Where there is a provision in the law allowing bills of exceptions in the tribunal having original jurisdiction, no inconvenience will arise and no injustice be done by regarding appeals as merely writs of *certiorari*, or writs of error ; for the bill of exceptions will serve to place on the record such facts and decisions in the inferior court, as it is proposed to review on appeal. But where no bill of exceptions is allowed, an appeal or writ of error or *certiorari*, only bringing up for review the regularity or validity of the record proper, will in many cases totally fail to subserve the object for which the appeal is taken.

As it regards an appeal by the owner or claimant of the land, the law only authorizes the recorder to put in the transcript, so much of the record as applies to the real estate of the party appealing, but in regard to appeals by the city, the law provides, that no more of the record be set out in the transcript by the recorder, than may be necessary to try and determine the questions in controversy. Now the question in controversy may arise from facts which the record in neither case will show, as the only record specifically required in the 8th section is a mere tabular statement of the name of the owner, the number of the lot, the amount of tax, penalty and costs. No express provision is made for a bill of exceptions, nor does any seem to have been contemplated ; yet it is difficult to see how the question in controversy could properly be determined in many cases without a bill of exceptions, if we construe the act as not giving the appellate court the right to try anew. In appeals from justices of the peace, the case is tried *de novo* in the appellate court, though under certain contingencies the judgment may be affirmed by the appellate court, or the appeal dismissed. This act authorizes appeals to be taken "in the same manner and to such courts

as appeals are allowed from judgments of justices of the peace in civil cases." The statute in relation to appeals from justices (2 Wagn. Stat., p. 847), requires the applicant to enter into a recognizance to the adverse party in a sum sufficient to secure the payment of such judgment and costs, conditioned that the applicant will prosecute his appeal with diligence to a decision; and that if on such appeal, the judgment of the justice be affirmed, or upon a trial anew in the appellate court judgment be given against him, he will pay such judgment, &c.

In the case of *Boggs vs. Brooks* (45 Mo., 232), there was an appeal from the judgment of the County Court, in a contested election case. The statute, as in this case, gave a right of appeal in general terms, and then the next section of the act provided for a bond—in terms, an exact copy of the same requirement in the law concerning appeals from justices' judgments, which has been copied above. There was no express grant of power to the appellate court to try the case anew, but the power to do so was held to be a necessary implication from the language of the section which provided the mode of appeal. We see no difference between that case and this. Had the legislature recited, as they did in providing for appeals in contested election cases, the provisions of the act concerning justices' courts which specifies the terms of the appeal bond or recognizance, it would have done no more to require the appeal as they have done here—to follow the manner and mode prescribed in the other statute referred to. There was no other manner prescribed in the act to take up the case, but to give just such a bond as is required in appeals from justices' courts, and the implication is as strong in the one case as in the other.

It is plain that a mere appeal from the recorder's judgment, containing nothing but a bare statement of names, dates and amounts, with no power to sign a bill of exceptions or put on the record any of the contested facts or points of law arising on them, would be a mere delusion which might be truly said "to keep the word of promise to the ear, and break it to the hope." Judgment affirmed. The other judges concur.

Martin, et al. v. Smylee.

JOHN L. MARTIN AND THOMAS H. MARTIN, Appellants, vs.
SAMUEL SMYLEE, Respondent.

1. *Practice, civil—Instructions refused—Others given in lieu of.*—The refusal to give instructions is not error when others are given in lieu thereof which fairly present the law of the case.
2. *Promissory note, execution of—Signature obtained by misrepresentations—Effect of.*—In suit upon a promissory note, where the evidence showed that without any carelessness or negligence on the part of defendant he was induced upon the fraudulent representations of the payee to sign the note, supposing it to be a contract of agency for the sale of certain plows, held, that no action will lie even on behalf of an innocent holder before maturity for value. (Briggs vs. Ewart, 51 Mo., 245, affirmed.)

Appeal from Ray County.

J. W. & J. E. Black, for Appellants.

I. Fraud in the execution of a note, negotiable in its character, does not affect its validity in the hands of a *bona fide* purchaser before maturity for value, in the usual course of trade. (Kent. Com. 9 Ed., Vol. 3, §§ 79, 80; Story Prom. Notes, 4 Ed., p. 193 n. 2; Farmers' Bank vs. Garten, 34 Mo., 119; Mattoon vs. McDaniel, 34 Mo., 138; Tumilty vs. Bank of Mo., 13 Mo., 275.) Appellants had no knowledge of any fraud in the original execution of the note, nor were there any circumstances surrounding its purchase that would excite the suspicion of a prudent man. (Sto. Bills, § 416, Edw. Bills, 506; 2 Pars. Bills, 277, 278, 279; Sto. Prom. Notes, [Ed., 1868,] § 382; Swift vs. Tyson, 16 Pet., 1; Goodman vs. Simonds, 20 How., 343; Bank vs. Neal, 22 How., 96; Murray vs. Laraner, 2 Wall., 110; Brush vs. Scribner, 11 Conn., 388; Redf. Lead. Cas., Notes & Bills, 257; Phelan vs. Moss, 67 Penn. St., 59; Magee vs. Badger, 34 N. Y., 247; Bank vs. Hoge, 35 N. Y., 65.)

Banister, Shotwell, and Esteb & C. F. Garner, for Respondent, relied on Briggs vs. Ewart, 51 Mo., 245; and authorities cited; also Washington Savings Bank vs. Ecky, 51 Mo., 272; Hamilton vs. Marks, 52 Mo., 78, and authorities cited.

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WAGNER, Judge, delivered the opinion of the court.

This case is identical in principle with the case of Briggs vs. Ewart, (51 Mo., 245,) and must be controlled and governed by it. The present case was an action commenced on a negotiable promissory note made by the defendant and assigned to the plaintiffs before maturity. The defense was, that it was never signed by the defendant as a note; that one England came to the defendant's house, and wanted him to take the agency for the sale of a patent gang plow; that he consented and was told that it was necessary for him to sign a contract of agency, which all agents were required to sign; that England then produced some papers and filled up the blanks, and, showed the defendant where to sign the same. All of the papers looked alike, were of the ordinary size of foolscap, and none of them had the appearance of promissory notes. England left one of the papers and took the others with him. It appears that the papers were signed solely and exclusively on the representation that they were mere contracts of agency, without any knowledge whatever on the part of defendant that there were notes among them, and that defendant never would have signed them had he known that they were notes. These allegations were denied in the replication, and on the trial there was evidence introduced, going to prove the issues tendered on each side respectively. The jury found a verdict for the defendant and the plaintiffs appealed. The jury who were the proper judges of the weight of testimony, must have found that the note was obtained and the signature procured in the manner stated by the defendant, and if no error was committed in giving declarations of law, the judgment cannot be disturbed.

The court refused certain instructions asked for by the plaintiff, but that will make no difference, providing others were given in lieu thereof, which fairly stated the law. In the first instruction given by the court of its own motion, the jury are told, that if they believe from the evidence that defendant executed the note sued on, as his note, with a knowledge of its contents, and that the same was transferred

to plaintiffs for value and before maturity, and without notice to plaintiffs of the fraud alleged in procuring its execution, they should find for the plaintiffs. The second instruction declares the law to be, that if the jury find from the evidence, that defendant was induced to execute the note sued on by the false representations of England, payee in the note, or by any other fraudulent means, but further find that he executed the same as his note, knowing all its contents, and that said note, was transferred through several indorsers to plaintiffs before it became due, in the usual course of business, and for a valuable consideration, and without knowledge of said fraud, then they should find for the plaintiffs. The fourth instruction, which is the only one of the series remaining and necessary to be noticed, says that if the jury find from the evidence, that the defendant did not execute the note sued on as a note, but as a contract to sell plows, but further find that a want of knowledge of its contents upon the part of defendant was an act of inexcusable carelessness and negligence; that said note has come into the possession of the plaintiffs in the usual course of trade before the same became due, for valuable consideration, with no knowledge of fraud or other defense that surrounded its original execution, the finding should then be for the plaintiffs.

At the instance of the defendant, the court then gave a declaration, that although the jury should find from the evidence that the defendant did sign his name to the paper sued upon, yet if they should further find from the evidence, that the signature thereto of the defendant was obtained without the fault or negligence of the defendant, on the fraudulent representations of the payee; that the paper to which it was put, was a contract for the agency for the sale of plows, and that the defendant neither knew that it was a note, nor intended to sign it as a note, but supposed that it was a contract for an agency for the sale of plows, and the payee did not pay a valuable consideration therefor, then the jury should find for the defendants.

These instructions submitted the case fairly and correctly.

It is evident that under these the jury must have been satisfied, that without any carelessness or negligence on the part of the defendant, he was induced upon the fraudulent representations of England to sign the note, supposing it was a contract of agency for the sale of plows, an instrument of an entirely different character and description.

He therefore never intelligently signed the note or entered into the contract. The case of *Briggs vs. Ewart*, *supra*, is precisely in point, and it is unnecessary to repeat the arguments, or cite the authorities, therein contained.

Let the judgment be affirmed. Judges Vories and Adams concur, Judges Napton and Sherwood, who are in favor of overruling the case of *Briggs vs. Ewart*, dissent.

—o—

JOHN CRAFTON, Respondent, *vs.* THE HANNIBAL & ST. JOSEPH RAILROAD COMPANY, Appellant.

1. *Damages—Railroads—Killing stock—Negligence.*—In unloading salt at a depot by the railroad employees, some of it was spilled, and afterwards a cow was killed by the cars at this point, presumably attracted thither by the salt: *Held*, that it was negligence to leave this salt on the track, and the railroad was liable.

Appeal from Linn Circuit Court.

Carr, Hall & Oliver, for Appellant.

George W. Easley, for Respondent.

ADAMS, Judge, delivered the opinion of the court.

This was an action by plaintiff against the railroad company for killing a cow belonging to him, commenced before a justice of the peace, and taken by appeal by defendant to the Circuit Court.

Upon the trial the evidence conduced to prove that the cow had been killed by an engine of defendant. The evidence also conduced to show that the defendant had, on the day previous to the night the cow was killed, unloaded some salt,

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and some of the salt had been spilled on the track, which attracted cattle. The cow was found dead on the track near this salt, the next morning, and when skinned, the sides seemed to be bruised, &c. The evidence showed the cow to be worth forty dollars, and the jury found a verdict for that amount, for which the court rendered judgment. When the evidence was closed, and before the case was submitted to the jury, the defendant demurred to the evidence, but the court overruled the demurrer, and the defendant excepted and, after filing a motion for a new trial, which was overruled, has brought the case here by appeal.

The only point made is that there was no evidence of negligence on the part of the defendant and, if there was, the plaintiff was guilty of contributory negligence by letting his cow run out when he had notice that there was salt spilt on the road. The evidence, in my judgment is amply sufficient to prove negligence in the servants of defendant, in leaving salt on the track, which it is well known will attract cattle. Although the plaintiff may have known salt was on the track, it was not his, but the defendant's, business to remove it. And he might well presume, that the defendant's servants would attend to their own business without any prompting from him.

Judgment affirmed with the concurrence of the other judges.

—O—

WILLIAM ROBSON, Plaintiff in Error, vs. ABNER THOMAS,
Defendant in Error.

1. *Acknowledgment*—*Certificate need not declare party to be "personally" known.*—It is settled in this State that it is not necessary that a certificate of acknowledgment should state that the person therein named as grantor was "personally" known to the officer. It is sufficient if it sets forth that such person was known to him.
2. *Ejectment*—*Sheriff's deed*—*Idem sonans.*—In ejectment by the grantee in a sheriff's deed, where the evidence showed that judgment was rendered for

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one "Mariah H. Mather;" but the deed recited the rendition of judgment for "Mariah Mathews," held, that the deed was inadmissible. Mathews and Mather are not *idem sonans*.

It matters not how words are spelled, they are *idem sonans* within the meaning of the books, when, if the attentive ear finds difficulty in distinguishing them when pronounced; or common and long continued usage has by corruption or abbreviation made them identical in pronunciation.

Appeal from Clinton Circuit Court.

F. M. Lowe and Thomas E. Turney, for Respondent.

F. E. Merryman and Charles Ingles, for Appellant.

SHERWOOD, Judge, delivered the opinion of the court.

Action of ejectment. Petition and answer in usual form. Both parties claim Harvey S. Bowers as the common source of title. The plaintiff read in evidence, against the objection of the defendant, a deed from Bowers to plaintiff for the land in controversy, dated the 12th day of March, 1862, and recorded September the 23d, 1865. The only ground of objection to this deed was, that the certificate of acknowledgment did not state that the grantor therein named was "personally known" to the officer. The certificate was in this form :

STATE OF WISCONSIN, }
County of Waupacca. } ss.

Be it remembered, that on the 12th day of March, A. D. 1862, personally came before me the above named Harvey S. Bowers, to me known to be the person who executed the said deed, and acknowledged the same to be his free act and deed for the uses and purposes therein mentioned.

[L. S.] W. S. CARR, Notary Public.
Waupacca Co., Wis.

The defendant having shown himself the purchaser at administration sale of all the right, title and interest of William Moore, deceased, in the property in question, offered in evidence a deed from the sheriff of Clinton County, dated and acknowledged October the 11th, 1864, and recorded Nov, 2nd, 1864, which recited a judgment recovered April 9, 1861, by Mariah H. Mathews and A. P. Mathews against Harvey S.

Bowers; the issuance of an execution thereon, August the 5th, 1864; and the sale thereunder of the land sued for, to William Moore on the 11th of October, 1864.

The plaintiff objected to the admission of this deed on the ground that it was not supported by any judgment or execution. And it was agreed between the parties that there was no judgment rendered as recited in said deed in favor of Maria H. Mathews and A. P. Mathews and against Harvey S. Bowers, nor was there any execution issued in favor of said Mathews and Mathews against said Bowers, as recited in said deed; but it was also agreed, that on the 9th day of April, 1861, Maria H. Mather and A. P. Mather recovered a judgment against Harvey S. Bowers; that execution issued on such judgment on the 5th day of August, 1864, directed to the sheriff of Clinton County, and that such execution is lost. The court then refused to admit the sheriff's deed to Moore in evidence, and also refused to admit the record of the judgment in favor of Mather and Mather in support of said deed.

Judgment was then rendered for the plaintiff and the defendant has appealed.

There was no error in admitting in evidence the deed from Bowers to the plaintiff, as the certificate of acknowledgment was not faulty or defective in the particular pointed out by defendant.

It is settled in this State, that it is not necessary that the certificate should state that the person therein named as grantor was "*personally*" known to the officer. It is sufficient if it sets forth that the person was *known* to him. (Alexander and Betts vs. Merry, 9 Mo., 514.)

The court properly refused to admit the sheriff's deed to Moore in evidence. Mathews and Mather are not *idem sonans*. Their ordinary pronunciation is by no means similar. The one is readily distinguishable in its sound from the other. (See State vs. Curran, 18 Mo., 320.) It matters not how two names are spelled, what their orthography is; they are *idem sonans* within the meaning of the books, if the attentive ear finds

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difficulty in distinguishing them when pronounced, or common and long continued usage has by corruption or abbreviation made them identical in pronunciation. (See *State vs. Hardy*, 21 Mo., 498, and cases cited; *Cato vs. Hutson*, 7 Mo., 142.)

As the above points are decisive of this case, it is unnecessary to notice others to which our attention has been called.

Judgment affirmed; Judges Adams and Napton dissent; the other judges concur.



ALEXANDER SMITH, Appellant, *vs.* PETER GUERANT AND JOSEPH G. EVERETT, Respondents.

1. *Court, Common Pleas of Caldwell County—Appeal to Circuit Court—Statute, constitutionality of.*—The provision in the law creating the Common Pleas Court of Caldwell County (Sess. Acts 1870, p. 209), providing for appeals or writs of error therefrom to the Circuit Court, is not now, nor was it at the time of its enactment, unconstitutional. (See *Ross vs. Murphy*, *ante* p. 372.)

Appeal from Caldwell Common Pleas.

John Dixon, J. H. Comfort and Haskinson & McLaughlin, for Appellant.

SHERWOOD, Judge, delivered the opinion of the court.

The Common Pleas Court of Caldwell County was created by an act of the General Assembly, which went into effect Oct. 1st, 1870 (Sess. Acts 1870, 209). The law of its organization provides, that causes shall be taken by appeal or writ of error from that Court to the Circuit Court of Caldwell County. This provision it was perfectly competent for the legislature to insert, and is not at all obnoxious to the charge of unconstitutionality at the present time, nor was it at the period of its enactment. (Our views on this subject are more fully expressed in the case of *Ross vs. Murphy*, *ante* p. 372.) It follows, that this court has no cognizance of this appeal, and that the same must be dismissed.

Judge Vories dissents. The other judges concur

Russell & Co. v. State Ins. Co.

RUSSELL & Co., Respondents, vs. THE STATE INS. CO., Appellant.

1. *Fire insurance—Account of loss—Furnishing proof of—Delay, waiver of—Allegation as to.*—Where by the terms of a fire insurance policy, a particular account of the loss was to be furnished to the company within thirty days thereafter, *held*, that in suit upon the policy, plaintiff might show, without specially alleging the fact, that delay in furnishing the account beyond the thirty days occurred by reason of the acts and with the consent of the company. No special averment of waiver is necessary under the Practice Act. (Wagn. Stat., 1020, § 42.) And such proof of waiver is not an excuse for non-performance; but proof of performance within the meaning of the contract. *A fortiori*, such is the law where the company not only acquiesces in the delay, but requests that the statement of loss be made more full and exact.
2. *Instructions—Disputed facts, combination of in single instruction.*—It is only necessary to instruct a jury as to disputed facts. And the court need not combine in one instruction all the facts proper to be considered.
3. *Insurance—Leave to take other insurance—Indorsement on policy, when unnecessary.*—The object of requiring leave to take insurance in another company to be indorsed on a policy, is to give notice of the additional policy, and where the same agent represented both companies and recommended and issued the additional policy, the original company cannot set up such failure of indorsement as a defense to a suit on its policy.

Appeal from Linn Circuit Court.

A. W. Mullins and G. H. Shields, for Appellant.

I. Under an averment of performance, evidence showing an excuse for non-performance cannot be given. (Pier vs. Heinrichoffen, 52 Mo., 333; 4 Sandf., 665; 3 Abb. Pr., 562; 29 Iowa., 104; 12 Tex., 118; 7 Barb., 167-71; 2 Wend., 399; 8 Johns., 392; 9 Johns., 115; 3 Johns., 528, 11 N. Y., 25-33.)

II. Where insurance in a specially named company is permitted, it cannot be renewed without consent of the insurer in another company.

G. W. Easley, with whom was *G. D. Burgess*, for Respondents.

I. Defendant's waiver of time could be proved without being pleaded. (St. Louis Ins. Co. vs. Kyle, 11 Mo., 278; Martin vs. Fishing Ins. Co., 20 Pick., 389; Davis vs. N. H. Ins.

Co. 7 Cow., 462; Insurance Co. vs. Lawrence, 2 Pet., [U. S.] 25; 2 Phil. Ins., 665, § 2122.)

II. No written indorsement of consent was necessary. The essential point was that the insurer should have notice of the additional insurance. This it had through its agent, who was also agent of the other company. The company knew of the fact and consented thereto. It could not afterward reap a harvest out of its connivance and fraud. (Carrugi vs. The Atlantic Ins. Co., 40 Geor., 135; Hayward vs. Nat. Ins. Co., 52 Mo., 281; 1 Phil. Ins. 501, § 904; Nat. Ins. Co., vs. Crane, 16 Md., 260, 295.)

NAPTON, Judge, delivered the opinion of the court.

This suit was upon a policy of insurance, to recover the amount of \$2,500, alleged to have been lost in the destruction of the premises by fire. The only allegation in the petition, about which there is any question, is the following: "That on or about the 12th day of April, 1871, the property insured by the defendant, and at that date owned by plaintiffs, was destroyed by fire, and that within thirty days thereafter, to-wit: on April 15th, 1871, plaintiffs did give notice of said loss to said company and delivered at its office in Hannibal, Mo., a particular account of said loss, as required by the terms of said policy, &c."

There was no demurrer to the petition. The answer sets up various defenses, principally based on alleged fraudulent representations in regard to the value of the property, and on the fact of other policies being taken out by the assured, without the consent of defendant, and because of frauds and false swearing of the plaintiffs in regard to the amount of loss. There was a replication to the answer, denying the defenses set up in the answer. The verdict was for the plaintiffs, and a motion for a new trial and in arrest. On the trial the policy was read in evidence. One of its terms was, that no other insurance should be made, without consent of the company, indorsed on the policy.

It seems from the evidence in this case, connected with the

verdict of the jury, under instructions, that on the 10th of May, 1870, Waters, one of the plaintiffs, applied to the defendant's agent at Linneus, for \$2,500 insurance on their stock of goods, and represented their value at \$10,000. On that day, there was an arrangement made between D. W. Russell & Co., of which firm Waters was a member, to consolidate their stock of goods with the goods of one Halliburton, who was occupying an adjoining store-house, and to take Halliburton into the concern; and invoices of the goods were commenced on that day and completed on the 13th or 14th of May. The amount of the two invoices was \$9,278.16. The policy being in the name of D. W. Russell & Co. was then, with the consent of the defendant, assigned to Russell & Co., of which said Halliburton was a member. In this policy, Russell & Co. or D. W. Russell & Co. were allowed a policy previously taken in the Phoenix Insurance Co. of St. Louis, and on the expiration of that policy, which occurred on the 14th of January, 1871, a policy to the like amount was taken in the Home Ins. Co. of New York. Shortly after the formation of the company of Russell & Co., based on the consolidation of D. W. Russell & Co. with Halliburton, they sent a stock of merchandise to Botsville, and had an insurance on that stock to the amount of \$2,500 in the company now sued, and in November, 1870, they removed this stock to Linneus. They then, as it appears from the letter of Strong, the secretary, wrote to him, asking the transfer of the Botsville policy of the merchandise removed to Linneus. The secretary declined, but suggested that the plaintiffs should take a policy for \$2,500 in the Aurora Ins. Co., of Illinois, of which he was also agent, and the plaintiffs acceded to this suggestion and took the policy for \$2,500 in the "Aurora." On the 12th day of April, 1871, the store house of Russell & Co. was burned and the stock destroyed by the fire, and an agent of defendant, upon notice, immediately went to Linneus to inquire into the details of the loss. This agent, Cooms, at intervals continued his examination, and before it was completed the thirty days had elapsed. The proof of loss was,

however, finally forwarded, and on its reception the Secretary replied, objecting to the want of a detailed account of items of the property destroyed and the value of each article. Subsequently a corrected statement was sent to the company.

The evidence in the case related chiefly to the value of the stock in the store-house of plaintiffs, and as this was a matter for the jury it is unnecessary to be detailed.

The principal objection to the evidence was the admission of Strong's letter, dated June 14th, 1871, on the ground that no waiver as to time was pleaded and therefore no evidence of a waiver could be introduced; and the admission of a second letter purporting to come from Strong, dated Nov. 25th, 1870, which was objected to on the ground that it was not written or signed by him, as secretary of the State Ins. Co., and upon this last point the defendants proved, that it was not in his handwriting; but the plaintiffs proved that it was a letter received by them in reply to a letter addressed to the company.

The instructions given to the jury, at the instance of plaintiffs were these:

1st. If the jury believe from the evidence that the policy of the defendant had not expired at the time of the fire, and that the plaintiffs lost goods by said fire, covered by the policy, then the jury are bound to find for the plaintiffs, unless the policy has been forfeited, by some act of the plaintiffs.

2nd. If the jury believe that the defendant, after the expiration of thirty days after the fire, required the plaintiffs to furnish additional or further proof of loss, then such requirement of defendant was a waiver of the time within which said proofs were to be presented, and if the jury believe that the plaintiffs in making their proofs of loss, gave as particular an account and description of the quality and description of the goods lost, as was in their power, then such proof of loss was a substantial compliance with the conditions of the policy.

3rd. Although the jury may believe that the plaintiffs, did on the 14th January, 1871 procure from the Home Ins. Co. of

New York, a policy of \$2500 covering the same goods insured by the policy here sued on, yet if the jury believe that said Home policy was taken instead of one which plaintiffs had in the Phoenix Ins. Co., and which had expired before the issuing of the Home Ins. policy and that permission was given in the policy sued on for \$2,500 insurance in the Phoenix Ins. Co., then the policy here sued on can in no way be affected by the said policy in the Home Ins. Co.

4th. If the jury believe from the evidence, that J. N. Strong was the agent of defendant, and also for the Aurora Ins. Co. at the time of issuing the policies read in evidence; that the policy issued by the Phoenix Ins. Co. had expired, and that by written consent of said Aurora Co., provided in its policy, plaintiffs were permitted to take other insurance to the amount of five thousand dollars, and that plaintiffs did after the expiration of the Phoenix policy, obtain from the Home Ins. Co. of New York, the policy issued by it, read in evidence, etc., then the fact that plaintiffs obtained said policy from the Home Ins. Co. did not vitiate the policy sued on, although the written consent of defendant was not indorsed on the policy.

5th. As to the estimate of the value of the goods mentioned in the first proof of loss made by plaintiffs, the rule of is, that the over valuation, in order to ground a defense thereon and defeat the plaintiff's action, must be made by the plaintiffs fraudulently and with a design to deceive the defendant. An over-estimate of the amount of their stock or of their profits arising from the business, if made innocently and mistakenly without fraudulent intent, is no bar to the plaintiffs' recovery of the actual loss sustained by the fire.

6th. Mistakes made by plaintiffs in the description of particular articles destroyed by the fire, or in any other respect, if not intended or designed to mislead or defraud the defendant, are not material and do not make out the charge of false swearing or fraud.

7th. If the jury find for the plaintiffs, they will assess their damages at one-third of the value of the entire stock covered

by the policy sued on, provided the damages do not exceed the sum of \$2,500, and to this sum the jury may add interest at the rate of 6 per cent. from and after 90 days after the proof of loss in this case.

The court also instructed the jury at the instance of defendant, giving all the instructions asked except two, which obviously conflicted with those given at the instance of plaintiff. The instructions given were as follows:

1st. The jury are instructed that the application made by D. W. Russell & Co. for the policy sued on, is a warranty on the part of the assured of the statement therein contained, which if false in any particular will annul the policy, and if the jury find that in said application said D. W. Russell & Co. stated that the stock of goods in the storehouse of said D. W. Russell, was at the time of such application of the value of \$10,000, and further find that the value of said goods was only \$5,349.43, they will find for defendant.

3rd. The pleadings admit, that it is a condition of the policy sued on, that if the assured shall have, or shall hereafter make any other insurance on the property hereby insured, or any part thereof, without consent of this company, and if the jury find that, after the issuing of this policy, the plaintiffs did make other insurance on the property covered by the policy, in the Home Ins. Co. of New York, without the consent of defendant, indorsed on said policy sued on; and that said Home policy was in force at the time of the fire, they will find for the defendant.

If the jury believe that the plaintiffs attempted to commit a fraud upon defendant by claiming that a bill of goods of \$169 had been destroyed by fire, and by that amount increased the amount of goods destroyed, when in truth the goods represented by said bill had not been destroyed or lost, or if the plaintiffs, for the purpose of defrauding defendant, claimed an item of \$187, for merchandise bought of More, Rhea & Co. and by that amount sought to increase the amount of goods lost in the said fire, when in truth said merchandise was sold to More, Rhea & Co., and said items

swelled the amount of goods lost by \$544, the jury must find for defendant.

6th. If the jury believe that the plaintiffs made and subscribed to the affidavit to proof of loss, dated May 27, 1871, read in evidence, showing the amount of the loss to be \$9,773.41, and delivered to the defendant such a statement of their actual loss and damages by the fire in question, and they further believe that the said loss and damages were materially less than would appear from said statement, and that plaintiffs knew the fact when they made and subscribed and were sworn to the same, the plaintiffs cannot recover on the said policy, and the jury will find for defendants.

Under these instructions a verdict was found for plaintiffs.

One of the principal points in this case grows out of the introduction of a letter from J. N. Strong, the defendant's secretary, dated June 12, 1871, which called for a more specific detail of the goods lost by the fire, than had been furnished the company. The fire occurred in April, about two months before the date of this letter. It appears that an agent of the company had been sent to Linneus, the locality of the store insured, immediately after the fire, and in connection with the insured and their clerks, was engaged from time to time at intervals, in seeing that a proper statement of the loss was made. This letter was offered to show that the objections to the plaintiff's particular account of the loss, which had been sent to Hannibal, were not upon the ground that it was not in time, but that it was not sufficiently explicit in details. It appeared very clearly, that this letter was received by the plaintiffs, in answer to one addressed to the company, and although not in the handwriting of Strong, *prima facie* emanated from the office of the company, and no proof being offered to the contrary, must be taken as an authoritative letter. The objection now insisted on, is that no proof of waiver was admissible in the case, as it was not averred in the petition. The averment of the petition is that the plaintiffs delivered at the company's office in Hannibal, a particular account of said loss, as required by the

terms of the policy. There was no demurrer to the petition, nor did the answer set up any defense growing out of the delay to furnish the particular account of loss within the thirty days. It is provided in section 10 of the Practice Act (Wagn. Stat., p. 1015), that "where any of the matters enumerated in section 6, of this chapter do not appear upon the face of the petition, the objection may be taken by answer. If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court over the subject matter of the action, and excepting the objection that the petition does not state facts sufficient to constitute a cause of action." The point of objection made here was raised, first, on the trial, in the introduction of Strong's letter, and again on the motion in arrest. The evidence offered was, that the plaintiffs did furnish a particular account of the loss, and that the particular time when it was furnished was of no importance, since the agent of the company, who was duly apprised of the fire, had been engaged in assisting the plaintiffs to make up such details of information as we may suppose were desired; and if the delay was occasioned by the acts of the defendant, or if the stipulation as to time of furnishing statement was practically rescinded and treated by the defendant as of no importance, such delay beyond the precise time fixed in the policy could surely be explained at the trial, and in reality was proof of the actual performance of the condition precedent, though not exactly within the time fixed by the policy. Time is not usually of the essence of any contract, and if it were, the party performing it may surely show that delays were occasioned by the acts of the party requiring the performance, and no special averment of this is required to let in proof of this character. Such averment was never held necessary either by this court or other courts, and waiver as to time has always been allowed. Nor has the Practice Act changed this as a rule of evidence, and required a special averment of waiver. The Practice Act was designed to promote a more liberal construction of plead-

ings—for in section 42, (Wagn. Stat., p. 1020,) it is declared that “in pleading the performance of a condition precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part;” and so I presume if he avers the performance of any specified condition, as well as a general allegation of performing all the conditions, he is not bound to state specifically how and in what time he has performed them. The proof of waiver, in this case, is not an excuse for non-performance at all, it is proof of performance, within the meaning of the condition. (St. Louis Ins. Co. vs. Kyle, 11 Mo., 278.)

This was the view taken by this court in the case above cited and it was then observed: “Several defects in the preliminary proof, which may be supplied, if objections are made by the underwriters in time, may well be regarded as waived when the underwriters put their refusal to pay distinctly on some other ground. Nor do I perceive any objection to such evidence on the ground that the pleadings involve a different issue. It is merely evidence of performance. It is not a case of a substitution of a new contract for an old one; it is not an excuse nor non-performance, by the prevention or discharge of the defendants; but it is evidence of performance. The party for whose benefit the condition is inserted, is presumed to understand its import, and his acceptance is the strongest evidence that the act agreed to be done has been done according to contract.” If this reasoning be correct, it certainly applies *a fortiori* to a mere delay in the time of performance, brought about by the act of the company’s agent, and acquiesced in by the company, who point out other objections to the statement of loss, and request that the one sent be made more full and exact. To allow the defendant to come in at the trial and for the first time object to all this statement, because it was not made in time, notwithstanding the fact that the delay was occasioned by the acts of its own agent, and notwithstanding the company subsequently assented to further proofs and waived all objections on account of time, would certainly be promotive

of anything else than justice, and we do not understand our Practice Act as requiring any such nicety in pleading. The case of *Elfranks vs. Seiler*, (54 Mo., 134,) is in conformity to this view, and the case of *Scharringhausen vs. Luebsen*, 52 Mo., 339, seems rather to conflict with it, and as it is a mere question of practice, we have concluded to adhere to the view expressed in the first named case.

A great variety of objections are made to the instructions in this case. We have copied them at large, not for the purpose of discussing or deciding upon each point of objection, but that it may be seen, that taken together they constituted a correct exposition of the law applicable to the disputed facts and sufficiently exact to avoid any misconception of their meaning by the jury of ordinary intelligence. It is only necessary for a court to instruct the jury upon disputed facts. It is not necessary to frame an instruction in such a way as to exclude all contingencies or exceptions about which there is no evidence—nor is it necessary in one instruction, to combine all the facts and circumstances proper to be considered by the jury, in order to justify a recovery. The objection to the first instruction, that a question of law was submitted to the jury by qualifying the right to recover, on the finding that the plaintiffs had not forfeited the policy by any act on their part, is unfounded. The subsequent instructions explain the acts which would forfeit the policy, at least all about which there was any controversy.

We see no objections to the 3rd and 4th instructions. The policy in the *Home Ins. Co.* was a substitute for one in the *Phoenix*, which had expired, and as leave was given in the policy sued on to insure in the *Phoenix* to that amount, it is not clear, that any notice whatever was necessary of this substituted policy within the meaning of the policy sued on. But if there were doubt upon this point, it is clear that Strong was the agent of the *Aurora Co.*, as well as of defendant; that he recommended and issued the *Aurora* policy, in which \$5,000 of other insurance was expressly recognized. The object of requiring leave to be indorsed on the policy is to give notice of

the additional policy. Strong, the agent of defendant, knew of the policy in the Phoenix and assented to it in this policy, and the policy on the Botsville goods; and when he issued the Aurora policy on the Botsville goods, subsequently transferred to Linneus, the Aurora policy expressly allowed the plaintiff to take other insurance to the amount of \$5,000. The whole transaction was well known to defendant's agent. The increase upon the amount of insurance was in fact the Aurora policy, which was issued on the suggestion of defendant's agent.

It could not be of any importance to the defendant, that on the expiration or cancellation of the Phoenix policy, the same amount insured by it was insured in the Home Policy of New York.

The court correctly stated the rule of damages, and the instruction asked by defendants on this point was not the law. That instruction maintained, that the plaintiffs were only entitled to recover two-thirds of one-third of the entire loss, whereas, they were entitled to recover one-third of the entire value of the stock insured and lost, provided it did not exceed \$2,500. The policies are distinct and independent, so far as the two-thirds rule in regard to the total value of the property is concerned.

All the defendant's instructions were given in this case, except one in relation to the measure of damages, and another in regard to the forfeiture of the policy sued on, by taking out a policy in the Home Ins. Co., and the substantial defenses asserted and relied on were submitted to the jury under instructions drawn up by the defendant. These defenses asserted fraud and falsehood and the jury passed upon the questions, and their verdict, so far as we can see from the evidence, was clearly right. The other defenses now insisted on are at best purely technical and have no merit in them.

Judgment affirmed. The other judges concur.

State v. Bittinger.

STATE OF MISSOURI, Appellant, vs. JOHN L. BITTINGER, Respondent.

1. *Construction of statute—Repeals—Remedies when concurrent—When not.*—The settled rule is that if a statute gives a remedy in the affirmative, without containing any express or implied negative, for a matter which was theretofore actionable at common law, this does not take away the common law remedy. And the same rule holds in civil and criminal cases.
2. *Crimes and punishments—Embezzlement—Donations to N. W. Lunatic Asylum—Failure of agent to pay over—What remedy proper.*—An agent of the County of Buchanan who under the act of March 28th, 1872, (Wagn. Stat., 170b, § 7) received a donation to be paid over to the commissioners for the North-western Insane Asylum "as soon as the same should be located at or near the City of St. Joseph, would not be liable to indictment for embezzlement under § 41, Art. 3, of the statute touching Crimes and Punishments (Wagn. Stat., 459-60,) for failure to pay over the money to the institution before it was permanently located at that point. The proper remedy in case of default in payment of money to that asylum when the same was due, would be a prosecution under § 25, of said act of March, 28th, (Wagn. Stat., p. 170). The agent would also be liable therefor to a civil action.

Appeal from Buchanan Circuit Court.

James P. Thomas, for Appellant.

I. It is not necessary that the indictment should aver that the Asylum had been permanently located at or near Saint Joseph, Missouri. The location cannot affect either the ownership of the warrant or the money, prior to its delivery to the commissioners, nor the guilt or innocence of respondent. The conversion of the \$15,000.00, to his use, and the making away with and secreting the money, constituted a felony under § 41 p. 459-60 Wagn. Stat., at all events.

Hall & Oliver, and Chandler & Sherman, for Respondent.

I. The money came into respondent's hands, if it all, under the act of March 28th; and the punishment for violation of that law is provided under § 25 of the act.

The order of the County Court directs payment to the commissioners, "when the Asylum is located at St. Joseph" and not before. The indictment fails to charge that the institution is so located.

WAGNER, Judge, delivered the opinion of the court.

The defendant was indicted under the 41st section of the statute (1 Wagn. Stat., p. 459, § 41), for embezzlement in converting to his own use, making way with and secreting money belonging to the County of Buchanan to the amount of fifteen thousand dollars. The indictment contained two counts. The first charged that on the 25th day of May, 1872, defendant was appointed, employed, and acting as agent and commissioner of Buchanan county; that said appointment, was made by an order of the County Court entered of record, by virtue of an act of the General Assembly of the State of Missouri, entitled an act to establish an Insane Asylum in the north-west or south-west portion of the State, to be called the North-western or South-western Insane Asylum, approved March, 1872; that by virtue of the above mentioned act, the County Court of Buchanan county donated to the commissioners of the said Asylum, the sum of fifteen thousand dollars, to be paid to said commissioners, as soon as the said Asylum should be located at or near St. Joseph, Missouri; that said County Court issued a warrant, duly signed by the presiding justice thereof, for the said fifteen thousand dollars, payable to defendant or his order; that said warrant was of the value of fifteen thousand dollars, and was by the said County Court delivered to the defendant for safe keeping, and for transfer to the commissioners of said Asylum as soon as the same should be permanently located at or near St. Joseph, Missouri, and was received by the defendant for the purpose aforesaid; that defendant on the 25th day of May, 1872, having the said warrant in his possession for the purposes aforesaid, unlawfully, fraudulently and feloniously converted the same to his own use, made way with and secreted the same. The second count substantially set out the charges the same as in the first, and alleged, in addition thereto, that defendant unlawfully, fraudulently, and feloniously, converted to his own use, made way with and secreted fifteen thousand dollars of the public money, &c. To this indictment the defendant by his counsel filed a demurrer which was sustained by the

court, and final judgment having been entered thereon, the State appealed.

The argument made in reference to the constitutionality of the act, so far as it gives County Courts power to make donations to the Asylum, has failed to convince us of its soundness. We see nothing in the act of a character which would justify us in holding it unconstitutional in that respect. The only question then, is whether the indictment was properly drawn on the 41st section above referred to. That section is the general law, and provides for all the usual and ordinary offenses coming within its purview and description.

By the 7th section of the law establishing the North-western or South-western Insane Asylum, it is provided as follows: "The commissioners are hereby authorized to receive for the institution gifts, grants, donations and bequests of any property or money from persons, counties, cities, towns or townships in aid of said institution, the title to which, shall be made to and vested in the State, for the use of the Asylum; and the County Court of any county, or corporate authority of any town or city in this State, is hereby authorized to donate any lands, money, bonds or other property to said institution, and the conveyance of any real estate and donation of money, bonds or property to the State for the use and benefit of said Asylum, shall be valid and binding upon the persons, authorities or corporations making the same." (1 Wagn. Stat., p. 170 *b.* § 7, 3d. Ed.) The 25th section of the same act, declares: "Any person who shall, after demand made, knowingly refuse to pay over or deliver to the commissioners or managers of said Asylum, any money, property or thing belonging thereto, or any person who shall knowingly convert to his own use any money appropriated by law, or any money or property donated or given to said Asylum or to the State for its use and benefit, shall, in addition to his civil liability, be deemed guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than five hundred dollars or by imprisonment not less than six months in the county jail, or by both such fine and imprisonment."

It is obvious that this last act gives a remedy for the wrong complained of and the offense charged in the indictment, and the question to be determined is, whether the mode of procedure pointed out in this act is concurrent with the remedy for the offense as it previously existed; or whether it is exclusive. The settled rule is that if a statute gives a remedy in the affirmative, without containing any express or implied negative, for a matter which was actionable at common law; this does not take away the common law remedy, but the party may still sue at common law, as well as upon the statute. In such cases the statute remedy will be regarded as merely cumulative. But where a new right or the means of acquiring it is given, and an adequate remedy for violating it is given in the same statute, then the injured parties are confined to the statutory remedy. (Pot. Dwarr. Stat., p. 275, n. 5.) This principle is illustrated by the case of *Lindell's Adm'r vs. Han. & St. J. R. R. Co.*, (36 Mo., 543.) There, the act amending the company's charter, gave the company "power by themselves or agents to enter and take from any land in the neighborhood of the line of their railroad, earth, gravel, stone, wood or other material necessary for the construction, and operation of said road;" and it provided a specific mode of proceeding by which the damages should be ascertained at the instance of either party, by three impartial and disinterested householders to be appointed by any justice of the peace, with a right of appeal to the County Court. Upon this act it was held that the common law remedy was superseded by the statute and the person injured must pursue the course pointed out therein; that the statute remedy was not merely cumulative upon the common law action, but was an entire substitution for it. This doctrine is sustained by many cases. (*Smith vs. Lockwood*, 13 Barb., 209; *Thurston vs. Prentice*, 1 Man. [Mich.], 193; *Bassett vs. Carlton*, 32 Me., 553; *Renwick vs. Morris*, 7 Hill., 575; *Calkins vs. Baldwin*, 4 Wend., 667; *Almy vs. Harris*, 5 Johns., 175; *Dudley vs. Mayhew*, 3 Comst., 9.)

It is true that the cases above referred to are civil cases, but the

same rule obtains in criminal practice. Thus, Bishop says: "If the offense existed at common law, yet a statute prescribes a particular punishment to be inflicted on those who commit it under special circumstances which it mentions, or with particular aggravations, then in matters of principle when the aggravated offense thus created out of the old one is made the subject of an indictment, the indictment should be drawn on the statute." (1 Bish. Criminal Prac., § 598, [2nd Ed.] 1; Whart. Crim. Law, § 371.)

In the present case the right and the means of acquiring it were given under the 7th section of the act, and the 25th section pointed out and afforded an adequate and complete remedy for its violation. The former section in express terms gave the County Court power to make the donation, and the latter section is so broad and comprehensive in its scope, that it reaches any and every person whatsoever, who shall, after demand made, refuse to deliver to the commissioners or managers of the Asylum, any money belonging thereto, or who shall convert to his own use any money appropriated by law, or any money given or donated to the Asylum or to the State for its use and benefit. The person so having or converting the money is liable in a two-fold character; first civilly, and secondly, by criminal prosecution for a misdemeanor.

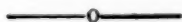
The indictment sets out the order made by the County Court, by which it appears that the sum was donated and appropriated to and for the use of the commissioners of the Asylum, to be paid to the commissioners as soon as the Asylum was located at or near St. Joseph, Missouri; and that the defendant was appointed agent or commissioner for the county, to whom the warrant was to be issued for said use, and to be delivered to, and paid to said institution or to the commissioners thereof, to be used by them in the procuring of the location and lands for the use and purpose of said Asylum, and to be paid as soon as said location was permanently made.

It is then alleged and charged that by authority of the legislative act, and the order of the County Court, the warrant was issued on the treasury of the county for the use of the

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commissioners of the Asylum, to pay the donation, and made payable to the defendant or order, for the use above stated and set out. By these averments it is abundantly shown that the warrant was issued upon certain conditions, and that defendant received it with a trust to carry out those conditions. But it is nowhere alleged that the Asylum has been permanently located at or near St. Joseph, a thing which was to happen, before the money was to be delivered over for the use of the Asylum, nor is there any allegation that the warrant or money belonged to Buchanan county. The defendant received the warrant and stood in the capacity of a trustee. It was intrusted to him to be used for a particular purpose, and applied in a certain manner. It might have been competent for the county to have revoked the order and to have called back the donation, but there is no charge that anything of that kind was done. Till such was the case the defendant held the warrant or the money he received thereon for the uses specified, and the only way to proceed against him would be under the provisions of the act establishing the Asylum as heretofore indicated.

Because the indictment does not contain necessary and essential averments, and because it does not appear to have been drafted upon the proper law, the judgment of the Circuit Court will be affirmed. The other judges concur.



WILLIAM H. H. SMITH, Respondent, vs. THE HANNIBAL AND ST. JOSEPH RAILROAD COMPANY AND JAMES A. MEYERS, Appellants.

1. *Practice, Supreme Court—Bill of exceptions—How must be signed.*—A bill of exceptions signed neither by the judge, nor in case of his refusal, by the bystanders. (Wagn. Stat., p. 1044, § 30) is a nullity and will be disregarded by the Supreme Court.

Smith v. Han. & St. Jo. R. R. Co. and Meyer.

*Appeal from Livingston County Court of Common Pleas.**Carr, Hall and Oliver, for Appellants.**Samuel and Collier, for Respondent.*

ADAMS, Judge, delivered the opinion of the court.

This was an action in the nature of a bill in Chancery for title to a tract of land.

A bill of exceptions was presented to the judge who tried the case, to be signed by him; but he refused to sign it on the alleged ground that it was not true in regard to certain instructions which the bill contained, under § 29, 2nd Wagn. Stat., 1044. The judge certified thereon the cause of his refusal, and thereupon, each party filed affidavits in regard to the matter in the bill of exceptions, alleged to be untrue; one in support of it, and the other against it.

The practice act (2 Wagn. Stat., 1044, § 30,) prescribes, that if the judge refuses to sign a bill of exceptions on the ground that it is not true, such bill may be signed by three bystanders. When a bill of exceptions is signed by bystanders and the court still refuses to suffer it to be filed, each party may file affidavits in support of and against the truth of such bill, and the Supreme Court will settle the question as to its truth.

But there can be no bill of exceptions at all, unless it be signed either by the judge of the court or by bystanders. This bill of exceptions was not signed at all and must be regarded as a nullity. There being no bill of exceptions, we can only look to the record proper for errors.

I find none in the record for reversal of the judgment.

Judgment affirmed. All the judges concur.

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A.

ACKNOWLEDGMENT; See Conveyances, 9; Evidence, 11; Sheriffs' Sales, 3.
ADMINISTRATION.

1. *Practice, Supreme Court—Death of party—Administrator, substituted how.*—Where defendant dies, pending an appeal in the Supreme Court, his administrator cannot be substituted in his stead, on motion of the adverse party. Such substitution can be made only on the voluntary appearance and consent of the administrator, or after service and summons issued for the purpose of *revivor* on him.—*Jeffries v. Flint*, 22.

2. *Administrators, suit by—Descriptio personæ.*—Where a note was given to an administrator in his representative capacity merely as a description, suit may be properly brought by him in his individual capacity.—*Smith v. Monks*, 106.

3. *Administrator's sales—Petition and affidavits for—Deed of lands—Irregularities in, when cannot be impeached collaterally.*—In ejectment for land bought by defendant at an administrator's sale, it appeared that the application for the sale of the land was made by an attorney of the administrator; that the petition was not accompanied with an account of the administration and a list of the debts due to and by the deceased and remaining unpaid, as required by the statute; that the affidavit to the petition and the report of the sale, and the deed to the purchaser, were made by the attorney and not the administrator. The deed contained all the statutory recitals. After final settlement by the administrator, but before his discharge, he himself personally made a regular deed of the land to plaintiff; *held*, that although these proceedings and papers may have been irregular and might have caused a reversal in direct proceedings for that purpose, they could not be impeached collaterally.

The administrator may make such deed after final settlement and may at any time make proper corrections of mistakes therein.—*Rugle v. Webster*, 246.

4. *Administrator—Action by, in the Buchanan Court of Common Pleas—Counter-claim may be set up—Statute, construction of.*—Section 6 of the act establishing Courts of Probate in the counties of Ralls, * * * Buchanan * * * etc. (Sess. Acts 1865-6, p. 83,) gives the Probate Courts exclusive jurisdiction "to hear and determine all suits and other proceedings against executors and administrators upon any demand against the estate of their testators or intestate." *Held*, that in a suit by an administrator on an indebtedness to the estate of the deceased, defendant may set up as a counter-claim a debt owing him by the estate, although the action was brought in the Buchanan Court of Common Pleas, and not the said Probate Court.—*Stiles Adm'r v. Smith*, 363.

5. *Administrator—Limitations, statute of—Letters, grant of—Averments as to.*—An administrator, although not bound to plead the general statute of limitations, must, in order to avail himself of it, plead the statute specially applying to suits against him in his official character; and must also allege the granting of his letters in the manner, and within the time prescribed by law.—*Id.*

6. *Administrator—Suit by, against creditor—Counter-claim—Limitations, statute of.*—The special statute of limitations touching administrators, contemplates cases where the creditor in the first instance brings his claim against the estate, and has no application to suits by the administrator against the creditor, where the demand of the latter is set up as a counter-claim. In such suit the only statute which can be pleaded against the counter-claim, under the statute (Wagn. Stat., p. 1274, § 3), is the general limitation law.—*Id.*

ADMINISTRATION, continued.

7. *Administration—Affidavit as to allowance of credits, etc., required only to causes in Probate Court.*—The requirement of the statute, (Wagn. Stat., p. 103, §§ 12, 15,) that a creditor, in establishing his demand against the estate of an administrator, shall make affidavit of allowance of all just credits and off-sets, etc., applies only to cases where the claim is presented in the Probate Court. When the party is sued in another court, the cause is tried upon pleadings and proofs as in ordinary actions.—*Id.*
8. *Administration—Annual settlements—Prima facie evidence—Suit on administrator's bond.*—Annual settlements, up to the time of making the final settlement by the administrator, are not final nor conclusive upon the parties interested, but only afford *prima facie* evidence of the facts therein contained, and are subject to be reviewed by the courts in a suit on the bond of the administrator.—*State, ex rel. v. Lankford, 564.*

See Guardian and Ward, 1; Insurance, 2.

ADMISSIONS; see Attorney at Law, 1, 2; Evidence; 3; Railroads, 17.

ADVERTISEMENT; see Publication; Streets, 4.

AGENCY.

1. *Principal and agent—Taking of notes in satisfaction of claim—Authority—Ratification.*—If an agent has no authority to receive anything but money upon a claim, no arrangement of his to receive notes in payment will bind his principal, unless ratified by the latter with a full knowledge of the facts.—*Buckwalter v. Craig, 71.*
2. *Agents—Declarations of, when part of the res gestæ.*—Representations of an agent, at the time of making a sale as agent, are admissible in evidence as part of the *res gestæ*.—*Brooks v. Jameson, 505.*
3. *Agency—How proved.*—The authority of an agent need not necessarily be proved by an express contract, but may be proved by the habit and course of business of the principal.—*Id.*
4. *Principal and agent—Third parties—Estoppel.*—If a man holds out another as his agent, and thus induces persons to deal with him as agent, the principal is estopped, as to such third parties, from denying the agency.—*Id.*

See Attorney at Law, 1, 2; Railroads, 10.

AMENDMENTS.

1. *Practice, civil—Records may be amended nunc pro tunc, when.*—After a case has been appealed to the Supreme Court, the Circuit Court has power to amend its records by entries *nunc pro tunc*. (*De Kalb Co. vs. Hixon, 44 Mo., 341.*)—*Jones v. St. Joseph F. & M. Ins. Co., 542.*

See Jeofails.

APPEARANCE; see Practice, civil; Trials.

ARBITRATION AND AWARD.

1. *Arbitration—Award—Bond to abide—Suit upon—Assignment of breaches.*—In an action brought upon a bond given to abide the award of arbitrators, the petition set forth the bond, and alleged the appointment of the arbitrators and submission of the matters in dispute to them; the award of a sum of money; demand thereof and part payment by the principal and his refusal to pay the remainder; for which sum the petition prayed judgment. Petition held under our code to be substantially good. The refusal of defendant to pay the sum awarded was the breach of the bond, and this breach was properly assigned. *Gray v. Burden, 158.*

ATTACHMENT.

1. *Attachment—Notice by publication—Failure of to name amount of damages—Judgment—Title of purchaser, how affected, etc.*—The omission in a notice by publication, issued in an attachment, to state the amount of damages claimed, does not render the subsequent proceedings and judgment void, so that the title of a purchaser at special execution sale made thereunder may be attacked collaterally.—*Holland v. Adair, 40*

ATTACHMENT, continued.

2. *Attachment—Publication—Amended petition—Sum originally prayed for—Judgment for, proper, when.*—Defendant in an attachment was brought in by publication, and a subsequent amended petition asked for judgment in excess of that originally prayed for, but the judgment was given for the amount originally claimed. The judgment was held proper within the meaning of the statute. (Wagn. Stat., 1854, § 12; Janney v. Spedden, 38 Mo., 395.)—*Id.*
3. *Attachment—Affidavit—Sale—Title.*—The affidavit attached to the petition in an attachment suit merely stated, that to the best of affiant's knowledge and belief defendant was a non-resident of the State. Held, that under such affidavit the court obtained no jurisdiction over the land attached, and that a sheriff's deed thereunder would be void and convey no title.—Bray v. McClurg, 128.
4. *Statutory attachment—Not in rem.*—A statutory attachment suit is not a proceeding *in rem*. The property is no party to the suit, but is brought before the court in aid of the remedy against the individual sued.—*Id.* PER ADAMS, J.
5. *Attachment—Affidavit—What sufficient to support a sale.*—Where an affidavit, issued in aid of an attachment under § 6 of the Attachment Act (Wagn. Stat., 1852), fails to state that plaintiff has a just demand against defendant, and fails to state any amount as due to plaintiff after allowing all just credits and set-offs, all subsequent proceedings, including sale and deed of land sold under the attachment, are void.—*Id.* PER NAPTON and VORIES, J. J., concurring.
6. *Attachment—Proceeding in rem.*—Attachment suits founded upon constructive service are essentially in the nature of proceedings *in rem*; and the seizure of the property, or obtaining possession of the *res*, is therefore the basis of the court's jurisdiction.—*Id.* PER WAGNER, J. dissenting.
7. *Attachment—Irregular affidavit—Subsequent proceedings not set aside collaterally.*—A defective or irregular affidavit in aid of an attachment, although it might cause a reversal of the judgment in the attachment proceedings, would not render the judgment or subsequent proceedings absolutely void. Where there was a valid writ and levy of the attachment, a judgment of the court, an order of sale, and a sale and sheriff's deed, the proceedings could not be set aside, in consequence of the irregularity, collaterally, in another suit.—*Id.* *Id.*
8. *Attachment—Irregular affidavit—Sale—Deed—Title.*—An affidavit in aid of an attachment, which merely states that defendant is a non-resident, is sufficient, without more, to support the writ; and a levy of an attachment properly issued thereunder, together with judgment, sale and sheriff's deed, will carry title to the property attached.—*Id.* *Id.*
9. *Attachment—Publication—Judgment—Errors set aside, when—Erroneous execution will hold property collaterally.*—Where suit is begun by publication and attachment, the judgment will bind only the property attached; but a general judgment in such case, although informal, is nevertheless valid till reversed, and will authorize the issue of a special execution against the attached property. And a court will at any reasonable time correct such a judgment by an entry *nunc pro tunc*. And a general execution issued in such case against the property attached will bind it until reversed or set aside in a direct proceeding, and cannot be impeached or drawn in question in a collateral proceeding.—*Id.* *Id.*
10. *Attachments—Publication—Order of, when may be issued by clerk in vacation.*—Under the statute of January 14th 1860, touching attachments, the clerk of the Circuit Court has power to make orders of publication in all cases where the court should in term have made them; and this power is not limited to the vacation which precedes the first session after filing the petition.—Kane v. McCown, 181.
11. *Attachment—Order of publication—Omission to designate newspaper—When not fatal.*—Under the practice act of 1855 (R. C., 1855, p. 1225, § 17) the omission of the clerk to designate in the order of publication the particular newspaper in which notice of suit shall be published, although an error, was not such an one as to destroy the judgment rendered thereon, in a collateral proceeding.—*Id.*

ATTACHMENT, continued.

12. *Attachment—Jurisdiction of court over property—Order of publication cannot be attacked collaterally.*—Where a writ of attachment is valid, conforming essentially and substantially to the requirements of the statute, and issued by the clerk in conformity with the power vested in him, the court obtains jurisdiction over the property, and although the order of publication be defective, the judgment of the court and sale of the property will not be thereby invalidated in a collateral proceeding.—*Id.*
13. *Attachment—Finding of court cannot be attacked collaterally.*—Where the record shows a finding of court, that there has been a legal order of publication and a publication in pursuance thereof, such finding cannot be attacked in a collateral proceeding by showing that there was no publication.—*Id.*

See Judgment, 1; Mortgages and Deeds of Trust, 6.

ATTORNEY AT LAW.

1. *Attorney and client—Authority to make compromise of suits, etc.*—The general rule is that an attorney cannot, by virtue of his general authority or employment to conduct a suit, bind his client by bargains or contracts to compromise or settle the cause of action; and particularly where land is received in satisfaction of the judgment to be recovered; unless some authority or sanction, either express or implied, has been given by his client for the purpose; or unless his conduct has been ratified by his client.—*Walden v. Bolton and Graham*, 405.
2. *Attorney—Admissions of, when binding upon client.*—Admissions, made by an attorney long after a case has been tried and his employment has ended, are not binding upon his client and are wholly incompetent.—*Id.*

B.

BANKRUPTCY; See Guardian and Ward, 2.

BILLS AND NOTES.

1. *Promissory notes—Signature as surety—Proof as to—Request by surety to sue—Allegation as to.*—In suit upon a promissory note *Held*:
 - 1st. That it was competent for defendant to show that he signed as surety;
 - 2nd. That an averment in his answer that defendant had requested plaintiff to sue the maker was sufficient without the further allegation that the request was in writing;
 - 3rd. That evidence, showing a verbal agreement between them, at the date of the note that plaintiff should promptly proceed to coerce payment was incompetent.—*Coats v. Swindle*, 31.
2. *Promissory notes—Usurious interest, cannot be credited upon.*—Usurious interest paid upon a note to procure an extension, cannot be recovered back, and in suit upon the note such payments cannot be applied as credits upon the note. (*Perrine vs. Poulson*, 53 Mo., 309; *Ransom vs. Hays*, 39 Mo., 445).—*Kirkpatrick v. Smith and Weakley*, 389.
3. *Promissory notes—Antecedent equities, etc.*—An innocent purchaser, before maturity without notice, of a negotiable promissory note, cannot be affected by antecedent equities.—*Id.*
4. *Promissory notes—Innocent holder for value, etc.—Antecedent equities.*—Fraud between the original parties to a negotiable note cannot be set up as a defense against a subsequent holder who took the note for value before maturity in the usual course of business, and without notice of the fraud.—*Corby v. Butler*, 398.
5. *Promissory notes—Indorsee before maturity presumed innocent, etc.*—An indorsee of negotiable paper before maturity is presumed to be the owner in good faith and for value, in the absence of evidence to the contrary.—*Id.*
6. *Promissory note, execution of—Signature obtained by misrepresentations—Effect of.*—In suit upon a promissory note, where the evidence showed that

BILLS AND NOTES, continued.

without any carelessness or negligence on the part of defendant he was induced upon the fraudulent representations of the payee to sign the note, supposing it to be a contract of agency for the sale of certain plows, *held*, that no action will lie even on behalf of an innocent holder before maturity for value. (*Briggs vs. Ewart*, 51 Mo., 245, affirmed.)—*Martin v. Smylee*, 577.

See Conveyances, 1; Practice, civil, 1; Practice, civil—Trials, 9.

BONDS, OFFICIAL; See County Treasurer.

BURDEN OF PROOF; See Ejectment, 2.

C.

CARRIERS.

1. *Carriers—Delay in delivering goods—Measure of damages.*—In an action of damages for delay in delivering goods, *held*, that although the goods at the time of delivery may have been valueless to plaintiff for the purpose for which they were bought, they could not recover for a total loss. The measure of plaintiff's damages would be any necessary expenses incurred in obtaining the goods, together with the difference between the cost of the goods and what could have been realized for them at the time and place of destination, if the amount were less than cost. If greater, there would be nothing to add or deduct.—*Rankin v. Pacific R. R.*, 167.

2. *Railroads—Notice of delivery by.*—Where goods are delivered on time by a railroad, the company is not compelled to notify the consignee of their arrival at the depot. *Id.*

3. *Common carriers—Delivery of goods by—Delays as to.*—It is the duty of common carriers in all cases to transport without unnecessary delay all goods received for carriage, whether they are intended for a particular purpose or not.—*Id.*

CHARACTER; See Practice, criminal, 6.

COMPROMISE; See Attorney at law, 1, 2.

CONSTABLE; See Replevin, 1.

CONSTITUTION OF MISSOURI.

1. *Constitution—"Solemn occasion," etc.*—What is—Each branch of State government to determine question for itself.—*Semble*, That what are "important questions of constitutional law," and what are "solemn occasions," (Art. VI, §11, State Const.) the framers of the Constitution intended each branch of the State government, to determine for itself.—Opinion given the General Assembly, 497.

2. *Constitution—Opinion of Supreme Court, cannot be given, when.*—The Court cannot, under the State Constitution, (Art. VI, Supreme § 11,) give opinions on questions involving the interests of corporations or private persons, which may subsequently come before it in contested cases.—*Id.*

3. *Constitution—Proposed legislation—Effect of on State lien, etc.*—Questions relating to the effect of a proposed law upon a prior lien of the State, are not ones of constitutional law, but depend upon facts and principles of common law.—*Id.*

4. *Constitution—Extension of loan—Giving or loaning of credit.*—*Semble*, That an act of the legislature, granting an extension of time upon a loan formerly made to a railroad company, is not in conflict with Art. XI, §14, State Const., which prohibits the giving or loaning of the State's credit, in aid of any person, association or corporation.—*Id.*

See Corporations, 5, 6; Court, Caldwell Common Pleas, 1; Courts, Circuit, 1; Townships, 1, 2, 3.

CONTINUANCE; See Practice, civil, 4.

CONTRACTS; See Bills and Notes; Conveyances; Corporations, 5, 6; Frauds, Statute of; Fraudulent Conveyances; Insurance, 2; Mortgages and Deeds of Trust; Penitentiary; Sheriff's Sales; Streets, 4; Surety.

CONVEYANCES.

1. *Vendor's lien—Deed, reserving—Note for unpaid purchase money—Misdescription of in deed—Purchase with notice of lien, etc. etc.*—A. made a written agreement with B. to sell him certain land, for a given sum of money and the assumption by B. of certain incumbrances upon the land. Accordingly, A. and his wife executed their deed for the land. The deed referred to the incumbrances and contained a clause reserving to the grantor a vendor's lien for the unpaid purchase money. The note given for the amount fell due in July, but was described in the deed as maturing in August. B. afterward made a deed of trust on the land to secure the prior incumbrances, and sold the same to C., who purchased with notice of the vendor's lien. *Held*, 1, that C. took the land, subject to the vendor's lien: 2, that the note was merely evidence of the debt, and an improper description of the note in the deed would not affect the lien: 3, that evidence identifying the note as given for the purchase money was competent: 4, it was not material that the note was made payable to A.'s wife and not to A. himself.—*Sitz v Deihl*, 17.
2. *Conveyance, by bank—Execution—Signature of president.*—A deed by its terms was made by the Farmers' Bank of Missouri in its corporate name, and was signed in the usual form, concluding as follows: "In witness whereof I, Stephen G. Wentworth, as president of the Farmers' Bank of Missouri, by direction of the Board of Directors, have hereunto subscribed my name and caused the common seal of said bank to be hereto affixed this 23rd day of February, 1866. (Signed,) S. G. Wentworth, President of Farmers' Bank of Missouri." The official seal of the bank was affixed at the proper place.
Deed held to be that of the bank (Wagn. Stat., 273, § 5). It was unnecessary that it should be signed in the corporate name of the bank by its president.
It is the affixing of the corporate seal that gives the assent of the corporation and establishes the validity of the deed.—*Shewalter v. Pirner*, 218.
2. *Deeds—Description of property—Vagueness of—Land known in community, how—Parol evidence as to.*—Parol evidence is admissible to show that land described in a sheriff's deed is well known in the community by the description given in the deed, however vague the description may appear. And if such can be shown to be the case, so that it can be seen that persons could not be misled or deceived by the description when applied to the actual premises in question, and that no sacrifice of the property could be produced by the description in the deed, it will be held sufficient to pass the title.—*Id.*
4. *Deeds—Description—False calls referring to known monuments—May be rejected when.*—Where there is a false call, demonstration or description in a deed, although it refer to known monuments, if the false description can be rejected and leave sufficient description to identify the land, the false description should be rejected, and the remainder will pass the land.—*Id.*
5. *Deeds—Covenant of warranty—Breach of—Mistake in conveyance of land—Defense of, etc.*—In suit on covenant of warranty, where it appeared that, contrary to the agreement of the parties, a certain tract of land, to which grantor had no title, was embraced in the deed, which grantor signed by inadvertence; *held*, that such facts were an equitable defense to the action.—*Stewart v. Hadley*, 235.
6. *Land and land titles—Conveyances—Remainder—Life estate.*—A conveyance was made to A., in trust for the sole and separate use of B., a married woman, during her natural life, and upon her death the remainder in fee simple absolute to vest in the children of said B. and her husband then living, and the children of any of their children who should die before her death. *Held*, that as at the time of making the deed, no one could tell that any of the children would survive the mother, the remainder was only a contingent, not a vested remainder.—*Emison v. Whittlesey*, 234.
7. *Conveyance—Description in, what sufficient—Parol evidence to identify land, when proper.*—The description in a deed which gives the "beginning corner"

CONVEYANCES, continued.

and the several courses so that it may be easily identified is sufficient, and parol evidence may be adduced to identify the land, where its locality is called in question.—*Orr v. How*, 328.

8. *Conveyances—Construction—Trusts—Uses.*—A conveyance was made to A. a married woman, conveying certain land to "her and her heirs forever," and providing that if B., who was a son of A., "should pay to each of the other heirs five hundred dollars and keep his father during life, then he will have and shall hold the same, and to his heirs and assigns forever, otherwise the same to be divided with all the heirs equally." *Held*, that the deed was not intended to vest the estate to the land, legal and equitable, in the grantee, but that she was to have the whole estate until the death of her husband, and at his death she became a trustee for B. and his brothers and sisters, the children of her husband; that by the terms of the deed B. was to be the sole beneficiary if he supported his father during his life, and paid the other children five hundred dollars each, but if he failed to do this, he was to share equally with the other children; and as a person while living cannot have heirs, the word heirs was not used in its technical sense, and meant the children of A's. husband.—*Cornelius v. Smith*, 528.

9. *Acknowledgment—Certificate need not declare party to be "personally" known.*—It is settled in this State that it is not necessary that a certificate of acknowledgment should state that the person therein named as grantor was "personally" known to the officer. It is sufficient if it sets forth that such person was known to him.—*Robson v. Thomas*, 581.

10. *Ejectment—Sheriff's deed—Idem sonans.*—In ejectment by the grantee in a sheriff's deed, where the evidence showed that judgment was rendered for one "Mariah H. Mather;" but the deed recited the rendition of judgment for "Mariah Mathews," *held*, that the deed was inadmissible. Mathews and Mather are not *idem sonans*.

It matters not how words are spelled, they are *idem sonans* within the meaning of the books, when the attentive ear finds difficulty in distinguishing them when pronounced; or common and long continued usage has by corruption or abbreviation made them identical in pronunciation.—*Id.*

See Administration, 3; Attahmet, 3, 5, 7, 8, 9; Ejectment, 3; Evidence, 10, 11; Fraudulent Conveyances; Land and Land Titles, 3, 4; Mortgages and Deeds of Trust; Sheriff's Sales, 2, 3, 4, 5.

CORPORATIONS.

1. *Conveyance by bank—Execution—Signature of president.*—A deed by its terms was made by the Farmers' Bank of Missouri in its corporate name, and was signed in the usual form, concluding as follows:

"In witness whereof, I, Stephen G. Wentworth, as president of the Farmers' Bank of Missouri, by direction of the Board of Directors, have hereunto subscribed my name and, caused the common seal of said bank to be hereto affixed this 23rd day of February, 1866. (Signed.) S. G. Wentworth, President of Farmers' Bank of Missouri." The official seal of the bank was affixed at the proper place.

Deed held to be that of the bank (Wagn. Stat., 273, § 5). It was unnecessary that it should be signed in the corporate name of the bank by its president. It is the affixing of the corporate seal that gives the assent of the corporation, and establishes the validity of the deed.—*Shewalter v. Pirner*, 218.

2. *Corporation—Power to hold land—Question not to be tried collaterally.*—After a corporation, that has the power to hold land, has purchased real estate, and the conveyance has been regularly executed to the corporation, it is not competent for the court, on the trial of a suit in ejectment for the recovery of the land, to decide the collateral question whether it was a violation of its charter for the corporation to receive the conveyance.—*Id.*

3. *Corporation—Articles of Association not filed—Note issued by officers of company—Effect of.*—Where articles of association were duly acknowledged

CORPORATIONS, continued.

and recorded in the office of the recorder of the county where a corporation was located (Wagn. Stat., 333, § 2), but were not then filed with the Secretary of State (See Wagn. Stat., 289, 290, § 4), the officers of the corporation had no power to issue the note of the company; and a note issued and signed by them as directors, would bind them personally; and not the corporation.

"Corporate existence," as used in the latter enactment, means full authority to transact business.—*Hurt v. Salisbury*, 310.

4. *Corporations—Liability of, for malicious acts of agents—Confined to what cases.*—The result of the cases seems to be, that where corporations have been held liable for the malice of their agents, the acts of the latter were not only in the scope of the supposed authority of the particular agent committing the act complained of, but the act done by the agent was done in the performance of business coming within the purview of the objects and purposes for which the corporation was created, and the powers were conferred by the charter.—*Gillett v. Mo. V. R. R. Co.*, 315. *PER VORIES, J.*

5. *Practice, civil—Corporation, appearance of admits existence.*—A corporation, by appearing to a suit, thereby admits its corporate existence.—*Seaton v. C., R. I. & P. R. R. Co.*, 416.

6. *Corporations—Debts of, prior to repeal of "double liability clause"—Action against stockholder for debt of company—Constr. of § 22, Ch. 1, of corporation law—Liability of stockholder—Allegation as to insolvency and dissolution of company—Action when several—Contribution.*—The St. Louis & St. Joseph Railroad Company became indebted in October, 1870, prior to the repeal of the "double liability" clause of the constitution, in the sum of \$7,858. In suit against a stockholder for this amount, plaintiff, among other matters, alleged in general terms that the company had become insolvent, and dissolved in December, 1870.

Held, 1st; that under a proper construction of § 22 of Art. 1, of the statute touching Corporations, (Wagn. Stat., p. 293, construed in connection with §§ 32, 39, Ch. 33, R. C. 1855, and Art. 8, § 6 of Const.) defendant could not be held liable for the entire amount of the debt, but only in a sum equal to the amount of stock owned by him, together with the amount of his unpaid subscription;

2nd; that the general averment of the insolvency and dissolution of the company was sufficient without a further statement of the particular facts upon which the averment was based. (A formal surrender on a judgment of dissolution was not necessary in order to authorize the creditors to sue under § 22 *supra*.)

3rd; that suits of the above description, whether brought in law or equity will not lie against defendants jointly, but must be begun against each one severally, and under our law the stockholder thus compelled to pay, must resort to his remedy for contribution.—*Perry v. Turner*, 418.

7. *Constitution—"Double liability"—Acts to enforce, may be limited as to time.*—Statutes designed to carry out the "double liability" clause, (Art. 8, § 6 of the State Constitution,) may limit the enforcement of such liability as to time.—*Id.*

8. *Practice, civil—Pleadings—Corporation cannot deny its existence, when.*—In a suit by attachment against a foreign corporation, where defendant voluntarily appeared and gave bond in its corporate name, *held*, that the company was thereby estopped from denying its corporate existence. (*Seaton v. Chicago, R. I. & P. R. R. Co.*, *ante* p. 416.) *Smith and Rowland v. Burlington & Mo. R. R. R. Co.*, 526.

See Insurance, 1; Railroads.

CORPORATIONS, MUNICIPAL.

1. *Town, incorporation of—False description—May be stricken out, when—Amendment of records of County Court—Quo Warranto, etc.*—The town of Cameron was laid off and platted on part of Section 23, Township 57,

CORPORATIONS, MUNICIPAL, continued.

Range 30, in Clinton county, and the plat was acknowledged and filed in the Recorder's office of the county, and the town was built up and inhabited. In 1867, a petition of its inhabitants to the County Court for incorporation referred to the metes and bounds as set out in the plat, but falsely described the location of the town, as in section 24, in which no traces of a town existed. The order of incorporation made by the County Court under the statute similarly mis-described the location.

In *quo warranto* to oust the trustees of the corporation. *Held*, 1st. That enough remained in the description without the false particular, to ascertain the location; and that such false description should be stricken from the order. 2nd. That the records of the court need not be amended so as to describe the location as in sec. 23.—*Woods ex rel. v. Henry*, 560.

2. *Town—Act incorporating amendable at subsequent term.*—The order of a County Court made under the statute, incorporating a town, is rather a legislative than a judicial act, and may be corrected at a subsequent term.—*Id.*

3. *County—Area diminished below 500 sq. miles, etc.*—An act of the legislature, diminishing the area of a county below five hundred square miles, is unconstitutional and may be treated as null and void by the County Court.—*Id.*

See Railroads, 20, 21; St. Joseph, City of; Streets, 1, 2.

COSTS.

1. *Practice, civil—Costs, taxation of—Recovery of amount below jurisdiction of court.*—The action of a lower court in overruling a motion to tax the cost against the plaintiff in a case on contract, wherein plaintiff recovered an amount below the jurisdiction of the court, is evidence that the court considered, that the plaintiff had reasonable ground to believe at the time of the commencement of the suit, that he was justly entitled to recover judgment for an amount within the jurisdiction of the court. (*Wagn. Stat.*, 343, § 12.)—*Hannan v. Shotwell*, 429.

COUNTER-CLAIM; See Administration, 4, 6, 7; Ejectment, 4.

COUNTIES; See Corporations, Municipal, 3; Schools and School Lands, 2.

COUNTY TREASURER.

1. *County treasurer—Failure to pay over school funds—Liability on what bond.*—The sureties on the general bond of a county treasurer are not liable for his failure to account for, and pay over to his successor in office, county and township school funds. For the special duties imposed upon him by the school law he is answerable on a separate bond.—*State to use of Maries County v. Johnson*, 80.

COURT, BUCHANAN COMMON PLEAS.

1. *Administrator—Action by, in the Buchanan Court of Common Pleas—Counter-claim may be set up—Statute, construction of.*—Section 6 of the act establishing Courts of Probate in the counties of Ralls, **** Buchanan *** etc. (*Sess. Acts*, 1865-6, p. 83,) gives the Probate Courts exclusive jurisdiction "to hear and determine all suits and other proceedings against executors and administrators upon any demand against the estate of their testators or intestate." *Held*, that in a suit by an administrator on an indebtedness to the estate of the deceased defendant may set up as a counter-claim a debt owing him by the estate, although the action was brought in the Buchanan Court of Common Pleas, and not the said Probate Court.—*Stiles v. Smith*, 363.

COURT—CALDWELL COMMON PLEAS.

1. *Courts—Common Pleas—Circuit—District—Appeal—Constitution.*—Section 13 of the Act organizing the Common Pleas Court of Caldwell county, (*Sess. Acts*, 1870, pp. 209-10), which gave the Circuit Court of that county appellate jurisdiction over the former court, was not in conflict with the then provision of the State Constitution, (*Art. VI*, § 12), creating District Courts, when that provision is taken in connection with section 1 of the same article, vesting in the General Assembly the power of establishing inferior tribunals. (*Harper vs. Jacobs*, 51 Mo., 296.)—*Ross v. Murphy*, 372.

COURT—CALDWELL COMMON PLEAS, continued.

2. *Court, Common Pleas of Caldwell County—Appeal to Circuit Court—Statute, constitutionality of.*—The provision in the law creating the Common Pleas Court of Caldwell County (Sess. Acts 1870, p. 209), providing for appeals or writs of error therefrom to the Circuit Court, is not now, nor was it at the time of its enactment, unconstitutional. (See *Ross vs. Murphy*, ante p. 372.)—*Smith v. Guerant and Everett*, 584.

COURTS, CIRCUIT.

1. The last clause of Art. VI, § 14 of the State Constitution which provides, that "No judicial circuit shall be altered or changed at any session of the General Assembly next preceding the general election for said judges," does not prohibit the passage, at such session, of a law abolishing the old judicial circuits throughout the State; and creating a new system *in toto*; where the law does not take effect and the new judges are not elected, till the expiration of term of office of the judges holding under the former system.—Opinion in response to the Senate, 215.

See Court, Caldwell Common Pleas.

COURT, SUPREME; See Constitution of Missouri, 1, 2, 3, 4; Practice, Supreme Court.

CRIMES AND PUNISHMENTS; See Practice, criminal.

CRIMINAL LAW; See Practice, criminal.

D.

DAMAGES.

1. *Damages—Street railroads—Jumping from platform—Negligence—Jury.*—In suit for damages against a Street Railway Company, where it appeared that a lad of seventeen years, and of sound mind, jumped or stepped from the car while in rapid motion, it was held improper to instruct the jury, that such action *per se* constituted negligence in law on the part of the boy. The question of negligence in such case should be left to the jury.—*Wyatt v. Citizens R. R. Co.*, 485.

2. *Damages—Railroads—Killing stock—Negligence.*—In unloading salt at a depot by the railroad employees, some of it was spilled, and afterwards a cow was killed by the cars at this point, presumably attracted thither by the salt: *Held*, that it was negligence to leave this salt on the track, and the railroad was liable.—*Crafton v. Han. & St. Jo. R. R. Co.*, 580.

See Attachment, 1; Carriers, 1; Ejectment, 4; Husband and Wife, 3; Justices' Courts, 10; Land and Land Titles, 7, 8; Railroads, 1, 3, 4, 5, 6, 8, 9, 11, 12, 18, 19, 20, 21; Schools and School Land, 1; Streets, 1, 2.

DESCRIPTIO PERSONÆ; See Mortgages and Deeds of Trust, 2, 4.

DESCRIPTION; See Conveyances, 1, 3, 4, 5, 7; Corporations, Municipal, 1, 2.

DRAINAGE; See Land and Land Titles, 7, 8.

DRAM SHOPS.

1. *Dram-shop licenses—Where wine may be sold without paying license—Const. Stat.*—Under the statute (Wagn. Stat., 1872, p. 554, § 29,) there can be but one place where it is lawful to sell wine without first obtaining a license for that purpose, and that is on the premises where it is produced or manufactured.—*State v. Wyl*, 67.

E.

EJECTMENT.

1. *Ejectment—Chain of title—Common source—Prima facie case.*—When both parties to a suit in ejectment claim title through a common source, plaintiff will make a *prima facie* case without tracing his title further.—*Holland v. Adair*, 40.

EJECTMENT, continued.

2. *Ejectment—Statute of limitations—Burden of proof.*—Plaintiff in ejectment makes out a *prima facie* case by proving his legal title. It is not necessary for him to go further and show a possession that could not be defeated by the statute of limitations. If defendant relied on this statute, it was incumbent on him to prove adverse possession. *Hulsey v. Wood*, 252.
3. *Ejectment by widow—Defective deed by married woman, reformation of, etc.*—In ejectment brought by a widow to recover certain land held by defendant under a defective conveyance made by plaintiff and her deceased husband, defendant, by his answer, prayed for a decree reforming the deed, for specific performance, etc.; held by the court, that, as the property at the time of the defective deed was not plaintiff's separate property, and had not been conveyed by her in form and manner required by the statute, the deed, as to plaintiff was null and void and could not be reformed; but held, that the court should, while rendering judgment for plaintiff for possession of the premises also award to defendant the value of the permanent improvements on the land, together with the purchase money paid for the land by plaintiff's grantee, minus the value of the rents and profits collected by defendant while in possession.—*Shroyer v. Nickell*, 264.
4. *Ejectment—Proceedings for compensation for improvements—Notice—What sufficient—Rents and profits—Damages for waste, etc.*—In proceeding under the statute, (Wagn. Stat., 561-2, §20, *et seq.*) by one against whom judgment had been obtained in ejectment, for improvements made by him "in good faith," prior to his having had notice of the adverse title, held, that the "notice" contemplated by the law, which would defeat plaintiff's claim for improvements thereafter added, was not confined to the notice in writing mentioned by § 28, but embraced any such information as would put a man of ordinary prudence upon inquiry.
In such proceeding defendant would not be entitled to recover by way of counter-claim rents and profits, or to recover damages for waste and injury prior to the rendition of judgment in the ejectment suit. *Lee v. Bowman*, 400.
5. *Ejectment—Outstanding title—Limitations, statute of.*—An outstanding title is not admissible in evidence in favor of the defendant in an ejectment suit, when it is barred against the plaintiff by the Statute of Limitations. (*McDonald vs. Schneider*, 27 Mo., 405, affirmed.)—*Totten v. James*, 494.

See Land and Land Titles, 2.

EQUALIZATION, BOARD OF; See Revenue, 2, 3, 4.

EQUITY.

1. *Chancery—Jury may pass upon issues.*—In chancery cases the court may take the opinion of a jury on issues to be framed for that purpose. *Gorman, Admr., v. Aust*, 163.
2. *Equity—Reference not allowed unless by consent, when.*—In proceedings in chancery to correct a mistake in the description of land in a conveyance, the court, under the statute, (Wagn. Stat., 1040, § 12; 1041, §§ 13, 17,) has no authority to award issues and refer them to be tried by referees, without the written consent of the parties. Such case does not come within the provisions of § 18, p. 1041, Wagn. Stat.—*Caulk v. Blyth*, 293.
3. *Equity—Mixed question of law and fact—Opinion of jury—Statute, construction of—Reversal.*—In equitable proceedings, the court cannot, under the statute (Wagn. Stat., 1041, § 13), submit to a jury for its opinion a mixed question of law and fact, but the error is not such as will justify the reversal of the judgment, the whole case having been heard and pronounced upon by the court itself.—*Adams v. Helm, Exec'r*, 468.

See Bills and Notes, 2, §; Conveyances, 5; Estoppel, 1, 4, 5; Guardian and Ward, 1; Practice, Supreme Court, 1.

ESTOPPEL.

1. *Land and land titles—Improvements on property—Claimant standing by, and permitting—Courts of equity will not interfere, when—Estoppel.*—Where one claiming the title to land is guilty of gross laches, and with full knowledge

ESTOPPEL, continued.

of his own claim allows the opposite party to expend his money, or waits until the property has largely increased in value, either from this or other causes, before asserting his rights, courts of equity are very reluctant to interfere, although there may be no bar of the statute.—*Moreman v. Talbott*, 392.

2. *Estoppe in pais does not affect subsequently acquired title.*—In ejectment for certain lands bought by defendant at a sheriff's sale, plaintiff will not be estopped from setting up an adverse title, by reason of the fact that at the sale, not then having any title in himself, plaintiff induced defendant to purchase by his representations that a good title would pass by the sale. Acts of *estoppel in pais* operate only upon existing rights, and do not affect a subsequently acquired title.—*Donaldson v. Hibner*, 492

See Agency, 4; Insurance, 2.

EVIDENCE.

1. *Evidence—Records—Registry acts for bona fide purchasers.*—The doctrine of this State is that the registry acts were enacted in favor of *bona fide* purchasers and mortgagees.—*Foster v. Breshears*, 22.
2. *Evidence—Married woman—Declarations of—Testimony concerning.*—As to matters touching which a married woman is an incompetent witness, testimony concerning her declarations is inadmissible.—*State v. Arnold*, 89.
3. *Practice, criminal—Evidence—Who the perpetrator—Admissions of third parties.*—In a criminal case, the defendant cannot introduce the admissions of a third party tending to show that such party, and not the defendant, committed the crime charged.—*State v. Evans*, 460.
4. *Practice, criminal—Reasonable doubt, what is.*—A "reasonable doubt" of defendant's guilt, such as will justify an acquittal, must be a substantial doubt of guilt, and not a mere possibility of innocence.—*Id.*
5. *Evidence—Conveyances, certified copies of—Record over fifty years old—Military bounty lands—Statute, construction of.*—Though it might be questionable, whether the certified copy of a conveyance of military bounty lands recorded over fifty years before, was admissible in evidence under the statute, (*Wagn. Stat.*, 595, §§ 35, 36) without further proof; yet it would be clearly admissible under the Act of March 22nd, 1873, (passed since the trial in this case) and therefore this court will not reverse the case on account of such admission, but adjudge the costs of the appeal against the party who offered the deed in evidence.—*Totten v. James*, 494.
6. *Ejectment—Outstanding title—Limitations, statute of.*—An outstanding title is not admissible in evidence in favor of the defendant in an ejectment suit, when it is barred against the plaintiff by the Statute of Limitations. (*McDonald vs. Schneider*, 27 Mo., 405, affirmed.)—*Id.*
7. *Evidence—Testimony as to language uttered in presence of accused—Qui tacet, etc.*—It is not proper in all instances where declarations are made in the presence and hearing of a person, that those declarations should be given in evidence against him: Unless it be shown that the party is immediately concerned, and that his silence might fairly be construed into an admission, the declarations will not be admissible.—*State v. Hamilton*, 520.
8. *Evidence—Impeachment of witness—General reputation as to moral character may be proved.*—In discrediting a witness, the examiner is not restricted to inquiries as to his reputation for truth. The examination may extend to his reputation for moral character generally.—*Id.*
9. *Practice, civil—Witnesses, re-examination of—Matter discretionary with court.*—When a party has examined his witness and the other party has cross-examined him, it is then generally discretionary with the court whether a re-examination will be allowed; and before the Supreme Court will interfere in such a case, manifest abuse and injustice would have to be shown.—*Id.*
10. *Practice, civil—Deed—Allegation of record—Proof of loss and contents.*—The allegation in a petition that a deed had been recorded, will not prevent plaintiff from proving that in fact it had not been recorded, and further proving its loss and contents.—*Henderson v. Henderson*, 534.

EVIDENCE, continued.

11. *Lost instrument—Acknowledgment—Court entry of—Parol evidence.*—Where a deed was shown to be lost or destroyed, held, that the grantee was not compelled to introduce an entry of its acknowledgment which had been made in open court, as the best evidence of the execution of the instrument, but might resort to parol evidence.—*Id.*

See Administration, 8; Agency, 2, 3, 4; Attorney at Law, 1, 2; Bills and Notes, 1; Ejectment, 1; Practice, civil, 1, 5, 6; Practice, criminal, 5, 6, 8, 9, 10; Railroads, 1.

EXCEPTIONS, BILL OF; See Practice, civil—Appeal, 1; Practice, Supreme Court, 10, 11.

EXECUTIONS.

1. *Executions—Sales under, after return day—Const. Stat.*—Under the act of March 23rd, 1863 (Sess. Acts 1863, p. 20), a sale under an execution theretofore levied may be made after the return day thereof.—*Kane vs. McCown*, 181.

2. *Execution—Handed over by sheriff to his successor—Sale may be completed by latter.*—The intention of the execution law of 1855, and that of 1865 (§§ 59, 63), was to require executions not completely executed to be handed over to, and completed by, the sheriff in office at the time of the sales.

See Attachments, 9; Judgments, 1, 2; Sheriffs sales.

F.

FENCES; See Railroads, 1, 6, 7, 13.

FILING INSTRUMENT SUED ON; See Practice, civil, 1, 5.

FRAUD.

1. *Fraud not presumed, when.*—Fraud will not be presumed, when all the facts in the case consist as well with honesty and fair dealing as they do with the intention to defraud.—*Henderson vs. Henderson*, 534.

See Bills and Notes, 6; Frauds, Statute of; Fraudulent Conveyances.

FRAUDS, STATUTE OF.

1. *Parol contracts—Performance of—Stat. frauds—Year, when commences running—Part performance.*—The year, within which a contract not in writing must be performed in order to escape the bar of the statute of frauds, (Wagn. Stat., 656, § 5,) must commence from the date of the contract, and not from the date of entering upon its performance. The doctrine of part performance has no application to this provision of the statute. Performance as meant by that section is complete, and not partial, performance. (*Atwood's Admr. vs. Fox*, 30 Mo., 499.)—*Sharp v. Rhie*, 97.

FRAUDULENT CONVEYANCES.

1. *Fraudulent conveyances—Creditors—Participation in frauds, etc.*—A purchaser at an execution sale becomes invested with all the rights of the creditor, and is clothed with all his remedies against fraudulent contrivances of the execution debtor. But those who become interested in the property without participating in the frauds are not affected by them.—*Gentry v. Robinson*, 260.
2. *Fraudulent conveyance—Vendee must have notice, etc.*—In order to defeat the title of a purchaser from one who conveys lands with a fraudulent intent, the vendee must have notice of the intent, or participate in the fraud.—*Henderson v. Henderson*, 534.
3. *Fraudulent conveyances, made to defeat certain creditors—Effect of.*—A debtor may convey his property to a portion of his creditors to the exclusion of others, but if the intention of such conveyance be to defeat certain other creditors, the deed as to them is fraudulent, and (the vendee being cognizant of the intent) is void.—*Id.*

G.

GUARDIAN AND WARD.

1. *Curator—Action against by widow for child's share—Remedy, form of, etc.*—Suit, in the nature of an action for money had and received by a widow against the curator of her minor children, for her child's share (Wagn. Stat., 539, § 4) of certain funds, which had been paid over by the administrator to the curator, will not lie. Where she fails to claim the amount till it has passed from the administrator to the curator, *semble*, that her only remedy would be a bill in equity, conjoining all persons in interest as parties, and adjusting their respective rights by appropriate decrees.—Skeen v. Johnson, 24.
2. *Guardian—Defalcation by—Liable after discharge in bankruptcy for money paid by surety, when.*—Where a guardian makes default, and his surety is forced to pay the deficit, the principal remains liable to his surety, notwithstanding the discharge of the former in bankruptcy, for the full amount paid on his behalf. (Nat. Bkruptcy. Act, §§ 19, 32, 33, 35.)—Halliburton v. Carter, 435.

See Infants; Practice, criminal, 12.

H.

HOMICIDE; See Practice, criminal, 6.

HUSBAND AND WIFE.

1. *Replevin against constable—Title to property—Assessment of value—Return of to defendant.*—In replevin against a constable for unlawful seizure, where defendant put in issue plaintiff's title to the property, and the jury found for the plaintiff and assessed the value of the property at a greater sum than the amount of the execution, judgment should be for the return to the constable, of the entire property, or payment to him of its entire assessed value, and not merely for that of an amount equal to the execution. In such case the presumption would be that the jury found plaintiff to have no title to the property.—Long v. Cockrell, Adm'r, 93.
2. *Ejectment by widow—Defective deed by married woman, reformation of, etc.*—In ejectment brought by the widow to recover certain land held by defendant under a defective conveyance made by plaintiff and her deceased husband, defendant, by his answer, prayed for a decree reforming the deed, for specific performance, etc.; *held* by the court, that, as the property at the time of the defective deed was not plaintiff's separate property, and had not been conveyed by her in form and manner required by the statute, the deed, as to plaintiff, was null and void and could not be reformed; *but held*, that the court should, while rendering judgment for plaintiff for possession of the premises, also award to defendant the value of the permanent improvements on the land, together with the purchase money paid for the land by plaintiff's grantee, minus the value of the rents and profits collected by defendant while in possession.—Shroyer v. Nickell, 264.
3. *Damages for injury to married woman—Separate action for, will lie by both wife and husband.*—For injuries received by a married woman, two actions for damages will lie, one by the wife and solely for damages resulting to herself, in which the husband is made a nominal co-plaintiff under the requirements of the statute; another by the husband alone for expenses and loss of her services incurred by him in consequence of the injury, and also in aggravated cases for compensation for his own services in waiting upon his wife during her illness.—Smith v. City of St. Joseph, 456.

See Witness, 1.

I.

"IDEM SONANS;" See Conveyances, 10.

IMPROVEMENTS; See Ejectment, 4; Estoppel, 1

INDICTMENT; See Practice, criminal.

INDORSEMENT; See Bills and Notes.

INFANTS.

1. *Estate of minors—Allowance to parents for past maintenance, when will be granted.*—A court of Chancery may make an allowance out of the estate of minors to their parents for past maintenance by the latter, where they are poor, and the infants are entitled to an estate large enough to admit of it and leave enough for their future education and support. But *semble*, that where the fund is no more than adequate for the education of the infants, such allowance will be withheld.—*Otte v. Becton*, 99.

See Guardian and Ward.

INJUNCTION; See Practice, civil—Pleading, 5.

INSTRUCTIONS; See Practice, civil—Trials; Practice, criminal, 7.

INSURANCE.

1. *Insurance Companies—Failure to affix common seal to insurance policy.*—In the absence of any requirements to that effect in the charter, the failure of an Insurance company to attach its common seal thereto will not invalidate a policy issued by the corporation.—*Nat. Banking & Ins. Co. v. Knaup*, 154.

2. *Insurance—Additional—Written indorsement—Agent—Notice to—Estoppel in pais.*—Where it was made the express condition of a contract of insurance that, if the assured should make any other insurance on the property without the written consent of the company indorsed on the policy, he should recover no insurance thereon, and it appeared that the agent was duly notified of such additional insurance and made no objection, *held*,

1st. That notice to the agent was notice to the company.

2nd. That upon such notice, in the absence of any dissent, the company would be presumed to have waived the written indorsement and would be bound. By its conduct in the premises it would be estopped from setting up the want of the indorsement as a defense to the policy.—*Pelkington v. The Nat. Ins. Co.*, 172.

3. *Insurance—Allegations as to value and loss—What sufficient, after verdict.*—In suit upon a fire insurance policy the petition alleged that defendant insured plaintiff to the amount of \$1200, on certain property described; and that the property was totally destroyed by fire. *Held*, that the averments of value and loss, were sufficient after verdict.—*Jones v. St. J. F. & M. Ins. Co.*, 342.

4. *Fire insurance—Account of loss—Furnishing proof of—Delay, waiver of—Allegation as to.*—Where by the terms of a fire insurance policy, a particular account of the loss was to be furnished to the company within thirty days thereafter, *held*, that in suit upon the policy, plaintiff might show, without specially alleging the fact, that delay in furnishing the account beyond the thirty days occurred by reason of the acts and with the consent of the company. No special averment of waiver is necessary under the Practice Act. (Wagn. Stat., 1020, § 42.) And such proof of waiver is not an excuse for non-performance; but proof of performance within the meaning of the contract. *A fortiori*; such is the law where the company not only acquiesces in the delay, but requests that the statement of loss be made more full and exact.—*Russell & Co. v. The State Ins. Co.*, 585.

5. *Insurance—Leave to take other insurance—Indorsement on policy, when unnecessary.*—The object of requiring leave to take insurance in another company to be indorsed on a policy, is to give notice of the additional policy, and where the same agent represented both companies and recommended and issued the additional policy, the original company cannot set up such failure of indorsement as a defense to a suit on its policy.—*Id.*

J.

JEOfAILS.

1. *Practice, civil—Instructions—Promissory notes—Jeofails, statute of, etc.*—An instruction, which leaves it for the jury to determine the question whether the instrument sued on was a promissory note, is bad; but where that question is wholly immaterial to the issue and is purely technical, *held*, that under the statute of jeofails (Wagn. Stat. 1036, § 19) such error would not authorize a reversal of the cause. (See also Wagn. Stat., 1067, § 33; 1034, § 5; 1037, § 20.)—*Lee v. Dunlap*, 454.

JUDGMENT.

1. *Judgment—Order of publication—General execution—Levy of on property attached—Irregular—Corrected here.*—A general judgment on an order of publication is void. But a general execution levied only on attached property is simply irregular, and may be corrected at any time by an amendment *nunc pro tunc*.—*Bray v. McClurg*, 128.
2. *Judgment—Execution—Motion to quash, etc.—Judgment by mistake entitled as against defendants not served, etc.*—Where plaintiff's petition alleged the indebtedness of A. B. & C., and prayed judgment against them, and judgment by clerical mistake was entitled as if against all three, but summons was served and judgment rendered and execution issued, against A. only, motion to set aside the judgment and quash the execution on the ground that the suit was now dismissed as to B. and C. would be error. Even if the judgment were irregular, A. could not take advantage of the error, when he gave his own consent thereto.—*Henry v. Gibson*, 570.
3. *Judgment against one of defendants virtually a dismissal as to the remainder, when.*—Even where all the defendants in a suit are brought into court, judgment taken by agreement against one only would be tantamount to a dismissal as to the others.—*Id.*
4. *Judgment by request to perfect appeal.*—Where a party requests the court to render final judgment against him, merely *pro forma*, for the purpose of perfecting his appeal to the Supreme Court, such course will not prejudice his rights.—*Id.*

See Attachment, 1, 2, 9; Sheriff's Sales.

JURISDICTION.

1. *Land titles—Action to set aside deed—Change of venue—Jurisdiction—Construction of statute.*—In a proceeding to set aside a conveyance of lands, venue may be changed from the county in which the land is situated, and the court to which the cause is so removed will thereby obtain jurisdiction of the *res*. This proposition is not in conflict with the Practice Act. (Wagn. Stat., 1003, § 8.)—*Henderson v. Henderson*, 534.
2. *Want of jurisdiction over subject—Right to take advantage of, never lost.*—The want of jurisdiction over the subject matter of an action may be taken advantage of at any time.—*Id.*

See Attachments, 1, 2; Justice's Courts, 8, 10.

JURY; See Equity, 1, 3; Practice, civil—Trials, 3; Practice, criminal, 4, 14.

JURY, GRAND; See Practice, criminal, 11.

JUSTICES' COURTS.

1. *Appeals from justice—Irregularity of proceedings—When too late to object to.*—When a party appears voluntarily in a cause and goes to trial, waives a jury, and submits the cause to the court for hearing, it is afterwards too late for him to object for the first time to the regularity of the previous proceedings.—*Smith v. Monks*, 106.
2. *Justice of the peace—Statement—Consideration.*—A statement filed with a justice need not specifically set forth the consideration upon which a note sued on is founded. *Id.*

JUSTICES' COURTS, continued.

3. *Justice's court—Appeal—Purpose of—May be shown by motion in appellate court.*—The effect of an appeal to the Circuit Court, without anything further, amounts to a full appearance to the action in the Circuit Court. But the appellant is allowed by motion in the Circuit Court to demonstrate the purpose of his appeal.—*Blunt v. A. & P. R. R. Co.*, 187.
 4. *Justices' courts—Appeals from—What errors noticed in appellate court.*—In appeals from a justice of the peace the Supreme Court will only pass upon such errors as were brought to the attention of the court below.—*Id.*
 5. *Justice's court—Set-off in excess of jurisdiction not allowed.*—In suit before a justice, defendant cannot introduce proof of set-off on an account which exceeds the jurisdiction of the justice, although by crediting plaintiff's demand upon it the claim is reduced within the limit of the jurisdiction.—*Reed v. Snodgrass*, 180.
 6. *Justice—Defense of payment—Statement unnecessary.*—In suit before a justice defendant may prove payment without filing his statement thereof. *Id.*
 7. *Justice of peace—Default—Motion to set aside—Appeal, etc.*—It is immaterial upon what ground a motion to set aside a default before a justice of the peace is made, or overruled. The only pre-requisite to the appeal, is the filing and overruling of the motion.—*Beers v. Atlantic & Pacific Railroad Company*, 292.
 8. *Justice's court—Appeal—Motion to dismiss—Affirmance of judgment.*—The Circuit Court has no power after sustaining a motion to dismiss an appeal from a justice of the peace, to affirm the judgment of the justice. But such error may be corrected in the Supreme Court without sending the case back. *Id.*
 9. *Mandamus—Justice of the peace—Appeal.*—Mandamus will not lie to compel a justice of the peace to grant an appeal. (State, *ex rel.* Wheeler v. McAuliffe, 48 Mo., 112.) The remedy in such case is by rule and attachment from the Circuit Court. (W. S., 849, § 10.) *Chicago, Rock Island and Pacific R. R. Co. v. Franks*, 325.
 10. *Justice's court—Damages for injuries to personal property—Jurisdiction of justice.*—An action before a justice to recover damages for the taking and detention of personal property where no claim is made for the recovery thereof, sounds in the injury done to the property as contemplated by sub-division 3, § 3, Art. I, of the act touching Justices' Courts, (2 Wagn. Stat., 809,) and is properly brought under that sub-division, and a judgment for fifty dollars in such case is within the jurisdiction of the justice.—*Alley v. Gamelick*, 518.
- Where suit is brought under sub-division 4, the damages claimed for injuries or detention) are not the cause of action, but are merely incidental to the recovery of a judgment for the specific property sued for.—*Id.*

L.

LAND AND LAND TITLES.

1. *Ejectment—Chain of title—Common source—Prima facie case.*—When both parties to a suit in ejectment claim title through a common source, plaintiff will make a *prima facie* case without tracing his title further.—*Holland v. Adair and Johnson*, 40.
2. *Sheriff's sale—Purchase at by plaintiff in execution—Irregularities in judgment, etc.*—Plaintiff in an execution issued on an irregular judgment, who purchases at the sheriff's sale, will hold the title, subject to divestiture by an after reversal of the judgment.—*Id.*
3. *Land and land titles—Conveyances—Remainder—Life estate.*—A conveyance was made to A., in trust for the sole and separate use of B., a married woman, during her natural life, and upon her death the remainder in fee simple absolute to vest in the children of said B. and her husband then living, and the

LAND AND LAND TITLES, continued.

children of any of their children who should die before her death. *Held*, that as at the time of making the deed, no one could tell that any of the children would survive the mother, the remainder was only a contingent, not a vested remainder.—*Emison v. Whittlesley*, 254.

4. *Land and land titles.—Mortgages.—Vendor's lien.—Waiver of.*—A vendor's lien on real estate is not waived by taking additional security, where the instrument creating the security, in terms retains the vendor's lien. The implied lien will be sustained whenever the vendor has taken the personal security of the vendee only, by whatever kind of instrument it may be manifested; and any bond, note or covenant given by the vendee alone, will be considered as intended only to countervail the receipt for the purchase money contained in the deed, or to show the time and manner in which the payment is to be made, unless there is an express agreement between the parties to waive the equitable lien. And on the other hand, the lien will be considered as waived whenever any distinct or independent security is taken, whether by mortgage of other land, or pledge of goods, or personal responsibility of a third person; and also where a security is taken upon the land, either for the whole or a part of the unpaid purchase money, unless there be an express agreement that the implied lien shall be retained.—*Id.*
5. *Land and land titles.—Improvements on property.—Claimant standing by and permitting.—Courts of equity will not interfere, when.—Estoppel.*—Where one claiming the title to land is guilty of gross laches, and with full knowledge of his own claim allows the opposite party to expend his money, or waits until the property has largely increased in value, either from this or other causes, before asserting his rights, courts of equity are very reluctant to interfere, although there may be no bar of the statute.—*Moreman v. Talbot*, 392.
6. *Land titles.—Purchase.—Notice putting on inquiry, etc.*—If a purchaser of land has such information touching certain facts as would put and ordinarily prudent man on inquiry in relation thereto, he is affected with notice.—*Fellows v. Wise*, 413.
7. *Lands.—Surface-water.—Drainage.—Water-courses.*—A proprietor of land may drain surface-water from his land in such way as may suit him, provided he does so in an usual and careful manner, without being responsible to others; but such water, after emptying into a stream, ceases to be surface-water and becomes a part of the stream.—*Jones v. Hannovan*, 462.
8. *Damages.—Instructions.—Benefits.—Injury, nominal.*—A plaintiff is entitled to damages when defendant has caused water to overflow plaintiff's land; but if no pecuniary damages are proved, such damages are only nominal; and the court is not required to instruct that the defendant is entitled to a verdict, provided the benefits accruing to the plaintiff from defendant's acts have been greater than the injuries arising therefrom.—*Id.*
9. *Land titles.—Acts of ownership done bona fide.—Possession.—Trespass.—Ejectment, etc.*—Where one does them in good faith, believing that he has valid title to certain land, acts such as, *e. g.*, cutting timber, etc., will constitute possession so that the real owner cannot maintain trespass, but must resort to his action in ejectment.—*Ware v. Johnson*, 500.
10. *Land titles.—Title to a part of a tract.—Cutting timber, etc., on remainder.—Trespass.*—One having color of title to only a portion of a tract of timbered land, cannot take possession of the remainder by acts such as chopping fire-wood and saw logs and the like, so as to compel the owner to resort to his remedy by ejectment, but will be liable as a trespasser.—*Id.*

See Conveyances, 7; Estoppel, 2; Pre-emption, 1; Sheriff's Sales, 2, 9, 10, 11, 12, 13.

LANDLORD AND TENANT.

1. *Landlord and tenant.—Attornment, void when.*—The attornment of a tenant to a stranger, except in the cases mentioned in the statute, is void. (See *Wagn. Stat.*, 880, § 15.)—*Leach v. Koenig*, 451.

LARCENY; See Practice, criminal, 8, 9, 10.

LICENSE; See Dramshops; Peddlers, 1.

LIEN, MECHANIC'S.

1. *Mechanic's lien—Contractors—Partnership—Non-joinder—Notice—What sufficient.*—Where a firm contracts to build a house, and suit is brought under the mechanic's lien law, both members need not be joined as defendants; either may be sued alone.

In such case, a notice of plaintiff's claim is not rendered insufficient from the facts that it alleges the demand to be against both members of the firm, and not merely against the one made defendant. (Putnam vs. Ross, 46 Mo., 337.)—Putnam v. Ross, 116.

LIEN, VENDOR'S.

1. *Vendor's lien—Deed reserving—Note for unpaid purchase money—Misdescription of, in deed—Purchase with notice of lien, etc., etc.*—A. made a written agreement with B. to sell him certain land, for a given sum of money and the assumption by B. of certain incumbrances upon the land. Accordingly, A. and his wife executed their deed for the land. The deed referred to the encumbrances and contained a clause, reserving to the grantor a vendor's lien for the unpaid purchase money. The note given for the amount fell due in July, but was described in the deed as maturing in August. B. afterwards made a deed of trust on the land to secure the prior encumbrances, and sold the same to C., who purchased with notice of the vendor's lien. *Held*, 1; that C. took the land, subject to the vendor's lien. 2; that the note was merely evidence of the debt, and an improper description of the note in the deed would not effect the lien. 3; that evidence identifying the note as given for the purchase money was competent. 4; it was not material that the note was made payable to A's wife and not to A. himself.—Sitz v. Deihl, 17.

2. *Vendor's lien—No waiver of, where vendor retains title, etc.*—As long as the vendor retains the legal title to land, there can be no waiver of the lien for the unpaid purchase money. The title being in himself, he can retain it until he is fully paid; and the taking of other or additional security of itself is no waiver of the right. (Adams vs. Cowherd, 30 Mo., 458.)—Strickland v. Summerville, 164.

3. *Land and land titles—Mortgages—Vendor's lien—Waiver of.*—A vendor's lien on real estate is not waived by taking additional security, where the instrument creating the security, in terms retains the vendors' lien. The implied lien will be sustained whenever the vendor has taken the personal security of the vendee only, by whatever kind of instrument it may be manifested; and any bond, note or covenant given by the vendee alone, will be considered as intended only to countervail the receipt for the purchase money contained in the deed, or to show the time and manner in which the payment is to be made, unless there is an express agreement between the parties to waive the equitable lien. And on the other hand, the lien will be considered as waived whenever any distinct or independent security is taken, whether by mortgage of other land, or pledge of goods, or personal responsibility of a third person; and also where a security is taken upon the land, either for the whole or a part of the unpaid purchase money, unless there be an express agreement that the implied lien shall be retained.—Emison v. Whittlesey, 254.

LIMITATIONS.

1. *Limitations, statute of—Absence of defendant from State—Const. Stat.*—The exception in the statute of limitations, which prevents time from being a bar on account of the absence of the defendant from the State, (Wagn. Stat., § 19, § 16,) only applies to those who were residents of the State at the time the cause of action accrued.—Fike v. Clarke, 105.

2. *Administrator—Limitations, statute of—Letters, grant of—Averments as to.*—An administrator, although not bound to plead the general statute of limitations, must, in order to avail himself of it, plead the statute specially applying to suits against him in his official character; and must also allege the granting of his letters in the manner, and within the time prescribed by law.—Stiles Admr'x. v. Smith, 363.

LIMITATIONS, continued.

2. *Administrator—Suit by, against creditor—Counter-claim—Limitations, statute of.*—The special statute of limitations touching administrators, contemplates cases where the creditor in the first instance brings his claim against the estate, and has no application to suits by the administrator against the creditor, where the demand of the latter is set up as a counter-claim. In such suit the only statute which can be pleaded against the counter-claim, under the statute (Wagn. Stat., p. 1274, § 3), is the general limitation law.—*Id.*
See Ejectment, 2, 5; Railroads, 2.

M.

MALICE; See Railroads, 4, 5, 10, 11, 12.

MALICIOUS PROSECUTION; See Railroads, 10 11, 12

MANDAMUS; See Justices' Courts, 9.

MECHANIC'S LIEN; See Lien, Mechanic's.

MILITARY BOUNTY LAND; See Evidence, 5; Mortgages and Deeds of Trust.

1. *Deeds of trust—Implied power in trustee to sell for debts of cestui que trust.*—A deed of trust, which binds the property conveyed for the payment of the beneficiary's debts, without express words, vests in the trustee an implied power to sell for that purpose.—*Porter v. Schofield*, 58.
2. *Deed of trust—Sale under—Trustee—Description of in deed.*—A trustee's deed, which describes him as trustee, and is signed by him with the word "trustee" added to his name, and describes the land conveyed by him as part of the lands deeded to him by the deed of trust, contains a sufficient reference to the source of his power to validate his sale and deed.—*Id.*
3. *Mortgage, to firm name.*—The fact that a mortgage is given to mortgagees in their firm name, does not affect its validity.—*Orr & Chesmore v. How*, 328.
4. *Mortgage—Redemption—Sale of equity of—Sale of title—Foreclosure, etc.*—Mortgaged lands having been sold by the mortgagee, it was decreed by the court that the mortgagor might redeem on payment of the purchase money and the value of the improvements, etc., and on failure to redeem, the court ordered sale of the equity of redemption, and after deducting expenses of sale and costs and payment of amounts due the mortgagee and purchaser at the mortgage sale, for improvements, payment of the surplus to the mortgagor. *Held*, that the decree, although not asked for by the mortgagee was proper, except that the whole title should have been sold instead of merely the equity of redemption. A strict foreclosure under the English practice, is foreign to ours and therefore improper.—*Davis v. Holmes & Elliott*, 349.
5. *Mortgage to county—Irregular foreclosure—Sale—Title of purchaser as against mortgagor.*—Where the order of a county court foreclosing a mortgage given to the county to secure a school debt, did not truly recite the debt so as sufficiently to identify the mortgage, *held*, that sale thereunder did not transfer any legal title, but the purchaser became in equity entitled to the mortgage debt, and might use the forfeited mortgage to protect him in the possession of the premises against the mortgagor and his heirs. In such case the latter may redeem; and until then the purchaser must account for the rents and profits, which however, may go to the satisfaction of the mortgage debt. (See *Jones vs. Mack*, 53 Mo., 147.)—*Honaker v. Shough*, 472.
6. *Mortgages and deeds of trust—Proceedings at law on same debt—Attachment—Sale of mortgaged property—Purchase by mortgagee—Purchase by stranger—Subsequent foreclosure as to part purchased by stranger—Contribution.*—A. mortgaged certain lands to B., and afterwards, in a proceeding at law by attachment for the debt secured by the mortgage, B. had these lands sold, purchasing a part of them, and C. a stranger purchasing a part. Subsequently B. brought an action on the mortgage, asking for a foreclosure thereof only as to the land purchased by C. *Held*, that B. had no right in an action at law on

MILITARY BOUNTY LAND, continued.

the debts secured by the mortgage to sell and buy in the mortgaged property, and that his purchase left the lands as they stood before, and that C's purchase, if valid at all, only amounted to a purchase of the equity of redemption; that C. had a right to demand that all the mortgaged property be brought before the court for foreclosure, in order that the other lands might bear their proportion of the entire indebtedness, and that without so doing B. had no standing in court.—*Young & Co. v. Ruth*, 515.

See Conveyances, 1; Land and Land Titles, 4; Sheriff's Sales, 7.

N.

NEGLIGENCE; See Damages, 1, 2; Railroads, 1, 19, 22

NORTH-WESTERN INSANE ASYLUM.

1. *Crimes and punishments—Embezzlement—Donations to N. W. Lunatic Asylum—Failure of agent to pay over—What remedy proper.*—An agent of the County of Buchanan who under the act of March 28th, 1872, (Wagn. Stat., 1706, § 7) received a donation to be paid over to the commissioners for the North-western Insane Asylum "as soon as the same should be located at or near the City of St. Joseph," would not be liable to indictment for embezzlement under § 41, Art. 3, of the statute touching Crimes and Punishments (Wagn. Stat., 459-60,) for failure to pay over the money to the institution before it was permanently located at that point. The proper remedy in case of default in payment of money to that asylum when the same was due, would be a prosecution under § 25, of said act of March, 28th, (Wagn. Stat., p. 170). The agent would also be liable therefor to a civil action.—*State v. Bittinger*, 596.

NOTICE; See Land and Land Titles, 6; Publication.

O.

OFFICERS; See Constable; County Treasurer; Schools and School Lands; Sheriff's Sales.

P.

PARENT AND CHILD; See Guardian and Ward; Infants.

PARTNERSHIP.

1. *Partnership—Action at law will not lie between.*—The law is well settled, that one partner cannot maintain an action at law against his co-partner for money paid on account of the indebtedness of the firm.—*Bond v. Bemis*, 524.

See Lien, Mechanic's; Mortgages and Deeds of Trust, 3.

PEDDLERS.

1. *Licenses—Peddlers—Constitutionality of.*—The law touching peddlers' licenses, (Wagn. Stat., p. 979, § 127,) is not in conflict with the Constitution of the United States, as discriminating in favor of manufactures of this State, and against those of other States. The law simply creates a tax upon a calling, and not one in any manner upon property. The amount of the tax is not regulated by the value of the article sold.

The peddlers' license law does not attempt to regulate inter-state commerce.—*State v. Welton*, 288.

PENITENTIARY.

1. *Penitentiary—Contracts for labor may be interfered with by act of Legislature.*—Neither the warden nor the inspectors of the State Penitentiary can make contracts for convict labor, which will preclude the Legislature from adopting

PENITENTIARY, continued.

another system necessarily interfering with the execution of such contracts. If parties contracting with the State thereby sustain loss, they undoubtedly have a claim against the State, but such as it is not in the province of the courts to allow.—*Hancock, Roach & Co. v. Ewing*, 101.

POWERS; See Mortgages and Deeds of Trust, 1, 2.

PRACTICE, CIVIL.

1. *Practice, civil—Note, non-filing of—Continuance—Production of note, etc.—*

Where suit is brought, by a subsequent indorsee against one who is the payee and prior indorser of a note, the non-filing of the note with the original petition constitutes no ground for granting a continuance to defendant. Section 51, Art. VI of the Practice Act (Wagn. Stat., 1022) has no application to such a case. Where an inspection of the note referred to in the petition, is necessary to enable defendant to prepare his defense, §§ 36, 37, Art. IX of said act (Wagn. Stat., 1044) point out the proper way in which to procure its production.—*Jeffries v. Flint*, 29.

2. *Practice, civil—Dismissal—Reinstatement.*—After the dismissal of a cause, it is competent for the court during the same term to reinstate the case.—*Brown Adm'r of Kirkpatrick, v. Foote*, 178.

3. *Motion—When part of the record.*—A motion is no part of the record unless made by a bill of exceptions.—*Id.*

4. *Practice, civil—Scire facias—Continuance of cause—May be set aside, when.*—Where suit on a recognizance is continued to the next term, and defendant is informed that he may depart in conformity thereto, it is manifest error to set aside the continuance and try the case at the same term; and an answer in such case setting up the continuance and attendant circumstances is a good defense.

While a court has the undoubted right to set aside an order continuing a cause, yet this never should be done in a manner to operate as a surprise upon the other party; and never without the existence of the most urgent reasons for vacating such order.—*State v. Whittsell*, 430.

5. *Practice, civil—Filing of contracts signed by both parties not required when—Const. Stat.*—The statute which provides for the filing of the contract sued on with the petition (Wagn. Stat., 1022, § 51), has no application to a contract signed by both parties. (*Campbell vs. Wolf*, 33 Mo., 459).—*Bowling v. Hax*, 446.

6. *Contract—Suit upon—Proof of subscribing witness.*—Under the present law permitting parties to testify, it is unnecessary, where suit is brought on a contract, to call a subscribing witness to prove the instrument. This proof may be made by the party himself.—*Id.*

See Costs; Tender, 1, 2.

PRACTICE, CIVIL—ACTIONS.

1. *Curator—Action against by widow for child's share—Remedy, form of, etc.—*

Suit, in the nature of an action for money had and received by a widow against the curator of her minor children, for her child's share (Wagn. Stat., 539, § 4) of certain funds, which had been paid over by the administrator to the curator will not lie. Where she fails to claim the amount till it has passed from the administrator to the curator, *semble* that her only remedy would be a bill in equity, conjoining all persons in interest as parties, and adjusting their respective rights by appropriate decrees.—*Skeen v. Johnson*, 24.

See Husband and Wife, 3; Partnership, 1; Quietting Titles.

PRACTICE, CIVIL—APPEAL.

1. *Practice, civil—Bill of Exceptions—Filing of in vacation without consent—*

Effect of.—A bill of exceptions in order to become part of the record must be signed and filed during the term at which judgment is rendered; except that by consent of parties, also made matter of record, it may be signed and filed at a subsequent period.—*West v. Fowler*, 300.

PRACTICE, CIVIL—APPEAL, continued.

2. *Practice, civil—Appeal—Record—Motions.*—Motions in arrest and for a new trial constitute no part of the record, unless they are incorporated in the bill of exceptions.—*Blount v. Zink*, 455.
3. *Practice, Supreme Court—Bill of exceptions—How must be signed.*—A bill of exceptions signed neither by the judge, nor in case of his refusal, by the bystanders. (*Wagn. Stat.*, p. 1044, § 30) is a nullity and will be disregarded by the Supreme Court.—*Smith v. The Hannibal and St. Joseph Railroad Company* and *James A. Meyers*, 601.

See Justices' Courts, 1, 3, 4, 7, 8, 9; Practice, Supreme Court.

PRACTICE, CIVIL; NEW TRIALS.

1. *Practice, civil—Motion for a new trial—What must be embraced in.*—*Semble*, that propositions of law or fact, not embraced in the motion for a new trial, will not be considered by the supreme court. *Gorman, Adm'r v. Aust*, 163.
2. *Practice, civil—Motion for new trial—Action of court on—When discretionary.*—It is a matter resting in the discretion of the court to overrule a motion for new trial, based upon the allegation that at the day of the trial one of the attorneys had just died, and his partner was so ill as to be unable to attend court.—*Jones v. St. J. F. & M. Ins. Co.*, 342.

See Practice, civil; Appeal, 2.

PRACTICE, CIVIL—PARTIES.

1. *Administrators, suit by—Descriptio personæ.*—Where a note was given to an administrator in his representative capacity merely as a description, suit may be brought by him in his individual capacity.—*Smith v. Monks*, 106.

See Husband and Wife, 3; Lien, Mechanic's, 1; Practice, civil—Pleading, 2, 3.

PRACTICE, CIVIL—PLEADING.

1. *Practice, civil—Pleading—Replication—Negative pregnant.*—In suit for damages against a railroad company for killing stock, the answer of the road set up a contract on the part of plaintiff to erect a fence along the road, charging that by reason of his failure to fence, the stock got upon the road. Plaintiff, in his replication, denied that he was bound by any contract with the company to build a fence on his own land on the line of the said road, as stated by defendant, and denied, "that plaintiff's stock came on said road by reason of plaintiff not building a fence that he was bound to build by reason of any contract that he had made." *Held*, that under our liberal practice, such a denial being collaterally set up in the pleadings, was sufficient to require defendant to produce the contract on the trial, so that its terms could be construed by the court.—*Ells v. Pacific R. R.*, 278.
2. *Practice, civil—Pleadings—Caption—Names of parties.*—In suit by a firm where the individual names of plaintiffs are set out in the caption of the petition, that is sufficient.—*Orr v. How*, 328.
3. *Practice, civil—Demurrer—Non-joinder of parties—Principal and surety.*—In an action to recover money charged to have been fraudulently obtained by defendant, the petition alleged that a judgment had been rendered against plaintiff as principal and defendant as surety on a bond; that defendant falsely represented that he had paid off and satisfied the execution; that on the faith of such representation, at the instance and request of plaintiff, one "A." paid defendant the amount sued for; that, in point of fact, the judgment had been satisfied, not by defendant, but by one "B." Demurrer charging defect of parties held not well taken. Although B. might sue defendant, as one of the defendants in the original execution, for money paid to his use, he could not sue on the claim of "A." as there was no privity between them, and defendant could not be held liable to "A" for the money paid by him, the same being paid at the instance of plaintiff. Money so paid might be considered as paid by plaintiff, who would have a right to look to defendant, while "A" could look to plaintiff.—*Menefee v. Arnold*, 368.

PRACTICE CIVIL—PLEADING continued.

4. *Practice, civil—Demurrer—Answer waives.*—To bring an issue raised by demurrer before the Supreme Court, defendant must stand upon his pleading. By answering over he waives his demurrer.—*Ware v. Johnson*, 500.
5. *Trespass—Injunction.*—An action for trespass may embrace a prayer for injunction. (Wagn. Stat., 1029, § 4.)—*Id.*
6. *Practice, civil—Pleadings—Corporation cannot deny its existence, when.*—In a suit by attachment against a foreign corporation, where defendant voluntarily appeared and gave bond in its corporate name, *held*, that the company was thereby estopped from denying its corporate existence. (*Seaton vs. Chicago, R. I. & P. R. R. Co.*, ante p. 416.)—*Smith and Rowland v. Burlington & Mo. R. R. R.*, 526.
7. *Practice, civil—Supplemental answer—Leave to file at close of evidence, etc.*—It is a matter resting in the discretion of the Circuit Court under the circumstances of the case to allow or forbid the filing of a supplemental answer, after the evidence is closed. Where, for example, the facts proposed to be set up might have been discovered by use of ordinary diligence, and it did not appear that the refusal would work a prejudice to the applicant, the court acted properly in refusing permission to file further such pleading.—*Henderson v. Henderson*, 534.
8. *Fire insurance—Account of loss—Furnishing proof of—Delay, waiver of—Allegation as to.*—Where by the terms of a fire insurance policy, a particular account of the loss was to be furnished to the company within thirty days there after, *held*, that in suit upon the policy, plaintiff might show, without specially alleging the fact, that delay in furnishing the account beyond the thirty days occurred by reason of the acts and with the consent of the company. No special averment of waiver is necessary under the Practice Act. (Wagn. Stat., 1020, § 42.) And such proof of waiver is not an excuse for non-performance; but proof of performance within the meaning of the contract. *A fortiori*, such is the law where the company not only acquiesces in the delay, but requests that the statement of loss be made more full and exact.—*Russell & Co. v. The State Ins. Co.*, 585.

See Administration, 4, 5, 6; Attachment, 2; Arbitration and Award, 1; Bills and Notes, 1; Liens, Mechanic's, 1; Practice, civil, 1, 3; Practice, civil—trials, 10; Practice, Supreme Court, 4, 5; Surety, 1.

PRACTICE, CIVIL—TRIALS.

1. *Practice, civil—Court—Jury—Instructions.*—Where parties leave the court to find the facts it is useless to multiply instructions.—*Beck v. Pollard*, 26.
2. *Practice, civil—Instructions—Evidence.*—Instructions having no evidence on which to base them should not be given.—*Fike v. Clark*, 105.
3. *Practice, civil—Jury—Waived when—Const. Stat.*—Where neither defendant nor his attorneys are present on the day set for trial, the court may, although answer has been filed, proceed to try the case *ex parte*, without a jury. In such case a jury is held to be waived. (Wagn. Stat., 1041, § 14.) Filing of an answer is not an "appearance" as meant by that statute.—*Jones v. St. J. F. & M. Ins. Co.*, 342.
4. *Practice, civil—Instructions should be taken as a whole.*—Instructions are proper, where, taken as a whole, they do not confuse or mislead the jury, and fairly present the law of the whole case.—*Clements v. Maloney*, 352.
5. *Practice, civil—Instructions, evidence.*—Instructions not warranted by the proof are properly refused.—*Corby, Ex'r of Corby v. Butler*, 398.
6. *Practice, civil—Instructions, etc.*—Instructions not based on evidence, should not be given.—*Fellows v. Wise*, 413.
7. *Practice, civil—Instruction—Error—Surplusage, etc.*—Where the objectionable part of an instruction is merely superfluous, and calculated to mislead no one, the granting of it is no ground for reversal.—*Bowling v. Hax*, 446.

PRACTICE, CIVIL—TRIALS, continued.

8. *Practice, civil—Instruction—Question of fact for jury.*—The giving of an instruction which calls upon the court to pass upon a question of fact, is manifest error.—*Id.*
9. *Practice, civil—Instructions—Promissory Notes—Jeofails, statute of, etc.*—An instruction, which leaves it for the jury to determine the question whether the instrument sued on was a promissory note, is bad; but where that question is wholly immaterial to the issue and is purely technical; *held*, that under the statute of jeofails (Wagn. Stat., 1036, § 19) such error would not authorize a reversal of the cause. (See Wagn. Stat. 1067, § 33; 1034, § 5; 1037, § 20.)—*Lee v. Dunlap*, 454.
10. *Practice, civil—Objection that petition states matter of law—When not considered by Supreme Court.*—The objection that plaintiff's petition sets up matters of law will not be considered by the Supreme Court, when not raised in the trial court by instructions, motion to strike out, demurrer or answer.—*Karle v. The K. C., St. Jo. & C. B. R. Co.* 476.
11. *Instructions should be taken as a series.*—If, when taken together, instructions are correct and not calculated to mislead, they are properly granted.—*Id.*
12. *Practice, Supreme Court—Invective of counsel.*—It is for the trial court to determine whether counsel transcend the limits of professional duty and propriety, and that determination cannot be assigned for error in the appellate court.—*State v. Hamilton*, 520
13. *Evidence—Impeachment of witness—General reputation as to moral character may be proved.*—In discrediting a witness, the examiner is not restricted to inquiries as to his reputation for truth. The examination may extend to his reputation for moral character generally.—*Id.*
14. *Practice, civil—Witnesses, re-examination of—Matter discretionary with court.*—When a party has examined his witness and the other party has cross-examined him, it is then generally discretionary with the court whether a re-examination will be allowed; and before the Supreme Court will interfere in such a case, manifest abuse and injustice would have to be shown.—*Id.*
15. *Practice, civil—Instructions refused—Others given in lieu of.*—The refusal to give instructions is not error when others are given in lieu thereof which fairly present the law of the case.—*Martin v. Smylee*, 577.
16. *Instructions—Disputed facts, combination of in single instruction.*—It is only necessary to instruct a jury as to disputed facts. And the court need not combine in one instruction all the facts proper to be considered.—*Russell v. State Ins. Co.*, 585.

PRACTICE, CRIMINAL.

1. *Scire facias—Bond—Appearance—Forfeiture at term subsequent to, etc.*—Where pursuant to the terms of his recognizance a prisoner presented himself at a term of court therein named and remained in court during the term ready to obey its orders, and no measures were taken to commit him or otherwise secure his appearance at any subsequent term, on adjournment the bond would be discharged, and could not be forfeited by the failure of the prisoner to present himself at a subsequent term.—*State v. Mackey*, 51.
2. *Criminal law—Indictment—Robbery in first degree—Conviction of in second degree—Autre fois acquit.*—One indicted for robbery in the first degree cannot be convicted of robbery in the second degree; and, in such case, a verdict of robbery in the second degree operates as an acquittal of robbery in the first degree.—*State v. Braannon*, 63.
3. *Criminal law—Robbery in first and second degrees—Grand Larceny, etc.*—Where an indictment, charging robbery in the first degree, contains all the descriptive elements of grand larceny, and defendant, under the indictment, might have been convicted of the latter offense, but was in fact found guilty of neither, but only of robbery in the second degree, he cannot afterward be arraigned and tried for either.—*Id.*

PRACTICE, CRIMINAL, continued.

4. *Criminal law—Separation of jury—When not a ground for new trial.*—The mere fact of the separation of the jury will not invalidate the verdict or furnish grounds for a new trial, unless it be made to appear that they have been tampered with, or that they have acted improperly.—*State v. Dougherty*, 69.
5. *Practice, criminal—Rule of court—Right of attorneys to cross-examine.*—Where two defendants in a criminal trial were represented each by separate counsel, and required different defenses, *held*, that a rule of court forbidding more than one counsel on either side to examine witnesses, in so far as it deprived either of said attorneys of the right to cross-examine witnesses, was null and void.—*State v. Bryant*, 75.
6. *Homicide—Evidence—Character of deceased, as violent, etc., shown when.*—In a case of homicide, where it is doubtful whether it was committed with malice or from a well grounded apprehension of danger, it is proper to show that the deceased had the reputation of a violent or dangerous man. *Id.*
7. *Practice, criminal—Instructions as to degrees of a crime.*—Whenever the evidence shows that a defendant may well be convicted of either of different degrees of the crime charged, the jury should be informed by the court, in what those degrees consist.—*Id.*
8. *Larceny—Evidence—Time of going off with property—Declarations then as to his motives and designs.*—On a trial for larceny the prisoner cannot make evidence for himself by adducing his own declarations as to his motives and designs at the time he went away from his home with the property.—*State v. Shermer*, 83.
9. *Larceny—Arrangements made to return property at time of taking—Evidence as to.*—In larceny for stealing a horse, evidence was held admissible to show that just before taking the horse away, the prisoner had made arrangements with a third person to return the animal to his owner after he had been driven to a certain town. Such evidence was proper to explain the conduct of the prisoner and to show his intention at the time of leaving.—*Id.*
10. *Criminal law—Larceny—Property must be taken animo furandi.*—The taking of property without the *animus furandi* cannot constitute the crime of larceny. Thus, where property was delivered to defendant under contract of sale, part of the purchase money to be paid on time, and the purchaser to retain and use the property meanwhile, and there was no pretense that at the time of the sale he had a felonious intent, he cannot be held guilty of larceny, from the fact that, after keeping and using the same for several months under the contract, he carried it away without completing the payment.—*Id.*
11. *Practice, criminal—Indictment—Grand Jury—Plea in abatement.*—An objection that certain members of a grand jury were discharged by the court, and others sworn in their places, and that being so altered the jury found the indictment, cannot be raised by plea in abatement.—*State v. Drogmond*, 87.
12. *Criminal law—Guardian—"Other persons"—Defiling girl under eighteen—Construction of Statute.*—In a prosecution under the statute (*Wagn. Stat. p. 500, § 91*) for defiling a girl under eighteen years of age, *held*, that mere permission given her to help the prisoner plant corn was not confiding her to his care and protection within the meaning of the law. The statute contemplated that the "other person," should stand in a position similar to that of a guardian, not necessarily that of a legal protector, but in an attitude of special trust, care and supervision.—*State v. Arnold*, 89.
13. *Practice, criminal—Venue, change of—Discretionary with court to grant, when—Amended statute touching.*—Where the prisoner applied for change of venue on the ground of prejudice in the judge and the application was made properly and in time, under § 19, (*p. 1097, Wagn. Stat.*) it was imperative on the court to grant the application. But under the act of 1873, amending § 19 (*Sess. Acts 1873, pp. 56-7.*) it was left discretionary with the court either to grant or refuse the prayer.

PRACTICE, CRIMINAL, continued.

Section 19, and its amendment apply equally to all petitions for change of venue as well when made for causes set forth in § 15, as in subsequent ones of the statutes. (Wagn. Stat., p. 1097.)—*State v. O'Rourke*, 440.

14. *Practice, criminal—Jurors, competency of.*—The examination of jurors in a certain cause showed that they had not formed or expressed an opinion concerning any material fact in controversy, which would influence their judgment, and were not related to the party. *Held* to be competent.—*State v. Evans*, 460.

15. *Practice, criminal—Evidence—Who the perpetrator—Admissions of third parties.*—In a criminal case, the defendant cannot introduce the admissions of a third party tending to show that such party, and not the defendant, committed the crime charged.—*Id.*

16. *Practice, criminal—Reasonable doubt, what is.*—A "reasonable doubt" of defendant's guilt, such as will justify an acquittal, must be a substantial doubt of guilt and not a mere possibility of innocence.—*Id.*

17. *Crimes and punishments—Embezzlement—Donations to N. W. Lunatic Asylum—Failure of agent to pay over—What remedy proper.*—An agent of the county of Buchanan, who under the act of March 28th, 1872, (Wagn. Stat. 1706, § 7) received a donation to be paid over to the commissioners for the North-western Insane Asylum "as soon as the same should be located at or near the city of St. Joseph, would not be liable to indictment for embezzlement under § 41, art. 3, of the statute touching Crimes and Punishments, (Wagn. Stat. 459-60) for failure to pay over the money to the institution before it was permanently located at that point. The proper remedy in case of default in payment of money to that asylum when the same was due, would be a prosecution under § 25 of said act of March 28th, (Wagn. Stat. p. 170). The agent would also be liable therefor to a civil action.—*State v. Bittinger*, 596.

See Statute, Construction of, 2.

PRACTICE—SUPREME COURT.

1. *Practice, Supreme Court—Evidence—Chancery.*—Generally the Supreme Court has no power to review facts except in chancery cases.—*Beck v. Pollard*, 26.

2. *Practice, Supreme Court—Death of party—Administrator, substituted how.*—Where defendant dies, pending an appeal in the Supreme Court, his administrator cannot be substituted in his stead, on motion of the adverse party. Such substitution can be made only on the voluntary appearance and consent of the administrator, or after service and summons issued for the purpose of revivor.—*Jeffries v. Flint*, 29.

3. *Practice, civil—Supreme Court—Bill of exceptions—Filing of, etc.*—Where a bill of exceptions is not filed in time, it may be stricken out on motion.—*Wright v. Sheur*, 70.

4. *Demurrer—Final judgment—Review.*—The action of the trial court in overruling a demurrer, where no final judgment was rendered thereon, cannot be made the subject of review in the Supreme Court.—*Nat'l Banking and Ins. Co. v. Knaup*, 154.

5. *Demurrer—Motion to strike out—How brought up.*—A demurrer and the action of the court thereon form a part of the record, and when the party stands upon his pleading it may be brought up without a bill of exceptions; but a motion to strike out, unless so preserved, forms no part of the record and cannot be carried up to the Supreme Court.—*Id.*

6. *Practice—Supreme Court—Refusal to prosecute—Voluntary dismissal.*—Where a plaintiff refuses to prosecute his suit, and judgment of dismissal for want of prosecution is rendered, it amounts to a voluntary dismissal on his part as he is no longer in court for any purpose.—*Pacific R. R. v. County Court of Franklin Co.*, 162.

7. *Supreme Court—Decisions of—What points should be reviewed.*—Although the decision of a single point in a case may determine the affirmance or reversal of the judgment in that case, it does not follow that the court may not proceed to examine and decide other points which the record presents.—*Kane v. McCown*, 181.

PRACTICE—SUPREME COURT, continued.

8. *Practice—Supreme Court—Jury—Evidence, etc.*—This court will not disturb the verdict of the jury on a question of conflicting evidence in an action for damages.—*Perkins v. M., K. & T. R. R. Co.*, 201.
9. *Supreme Court—Assignment of errors.*—Appeal dismissed for failure to file assignment of error, statement of brief, etc.—*Clark v. Estees*, 253.
10. *Practice—Supreme Court—Bill of exceptions—Signing and filing of.*—A bill of exceptions, not signed by the judge till his office had been abolished by the act of the legislature, and not filed by the clerk, will not be reviewed by the Supreme Court. The bill, until both signed and filed, forms no part of the record. (Wagn. Stat., p. 1043, § 28 and 1044, § 31.) The term "filed" as employed in the latter section comprehends the entry made by the clerk on the record.—*Fulkerson v. Houts*, 501.

See Justices' Courts 4, 8; Practice, civil—Appeal; Practice, civil—New Trials, 1; Practice, civil—Trials, 12, 14; Railroads, 18; Variance, 2.

PRE-EMPTION.

1. *Pre-emption in another's name in fraud of statute—Resulting trust—Equitable relief, when granted.*—Where one enters land which he cannot legally enter in his own name, in the name of another, in evasion of the law, no trust will result in his favor and equity will grant him no aid.—*Higgins v. Higgins*, 346.

PRINCIPAL AND AGENT; See Agency.

PRINCIPAL AND SURETY; See Surety.

PUBLICATION; See Attachment, 1, 2, 9, 10, 11, 12, 13; Judgment, 1.

Q.

QUIETING TITLE.

1. *Action to quiet title—Answer, what stops defendant.*—In suit under the statute, (Wagn Stat., 1022, §§ 53, 54,) to quiet title where defendant by his answer disclaimed all right and title adverse to the petitioner, but also denied plaintiff's title, *held*, error in the court to enter upon a trial of the cause. The disclaimer operated as a bar to any adverse claim of defendant; that portion of defendant's answer denying plaintiff's title was a mere nullity and surplusage.—*Jordan v. Stevens* 361.

R.

RAILROADS.

1. *Railroads—Crossing—Killing of stock—Prima facie case—How made out—How rebutted—Double damages.*—Proof that stock were killed at a road crossing by a railroad train and that the bell was not rung, and the whistle not sounded, for an interval of eighty rods from the crossing as required by statute, (Wagn. Stat., p. 310, § 38,) is sufficient to make out a *prima facie* case against the company, without further evidence that its employes and servants were guilty of negligence which caused the damages. In order to free itself from liability, the company must show that it has discharged every duty imposed by law; unless it be shown that the injured party has in some way contributed to the injury, or the circumstances rebut the presumption that the injury resulted from neglect of duty on the part of the company. In suit under the above statute, judgment for double damages would be improper.—*Howenstein v. Pacific R. Co.*, 33.
2. *Mandamus—Certificate of stock—Statute of limitations—Begins to run, when.*—A subscriber of stock in the Pacific Railroad Company in the year 1859 had paid up all calls, including \$70, which had been paid to an agent of the company who died without transmitting the sum. In 1870 the company declared the stock forfeited by reason of the non-payment of the \$70.

RAILROADS, continued.

In mandamus to compel the issue of certificate of stock, the company set up the statute of limitations. *Held*, that the statute did not run in favor of defendant till the stock was declared forfeited.—*Rice v. Pacific Railroad*, 146.

3. *Railroads—Damage for ejecting passenger—Tender of fare—Effort to procure ticket.*—In an action for damages against a railroad company for ejecting plaintiff from defendant's cars, evidence that a friend of plaintiff offered to pay the amount claimed by the conductor, while the latter was attempting to put plaintiff off the train for the refusal to pay his fare, was not proper evidence to show that plaintiff was from that time entitled to remain on the train, notwithstanding such refusal to pay in the first instance.

In such suit evidence that plaintiff had made an ineffectual attempt to procure a ticket before entering the train, although incompetent to show his right to remain on the cars without payment of fare, would be proper, nevertheless, in order to show his good faith in getting aboard without his ticket, and as a part of the *res gestæ*.—*Perkins v. M. K. & T. R. R.*, 201.

4. *Railroads—Putting passenger out of train—Malice of conductor—Liability of company.*—When it becomes the duty of a railroad conductor to put off a passenger for refusal to pay his fare, (Wagn. Stat., p. 307, § 28,) the company will be liable for any injury which may result to the passenger from the negligent or improper manner in which the conductor performs this act; and the company is bound when in such case the injuries are inflicted willfully or maliciously.

Where the agents of a corporation act in the scope of their authority in a willful or malicious manner, the company is responsible for resulting damages.—*Id.*

5. *Railroad companies—When liable for malicious acts of their officers.—Semble*, that where a conductor wrongfully and maliciously ejects a passenger from his train, the jury may, in addition to compensation for injuries received, assess exemplary or punitive damages, and *held*, that a slight circumstance, such as the retention of the officer in its employ by the company afterward will be construed into a ratification of its act, and the company will be so liable.—*Id.*

6. *Damages—Railroad—Failure to fence—Injury—Presumption as to cause.*—In an action brought under § 43 of the Act, touching railroad corporations for killing of stock, (Wagn. Stat., 310-11) wherever it is shown that stock has been killed on the track where it is the duty of the company to fence in the road, and the company has failed to fence in the manner required by law, a *prima facie* case is made for plaintiff. It is not requisite that the plaintiff should show further by affirmative evidence, that the stock were caused to go upon the road by the failure of the company to fence it. (*Fickle vs. St. L. K. C. & N. R. R.*, 54 Mo. 219.)—*Walther v. Pacific R. R.*, 271.

7. *Railroads—Damage to stock—Enclosed and timbered lands—Fencing—Const. Stat.*—In suit for damage to stock under § 43 of the Railroad Act, (Wagn. Stat., 310-11;) where it appeared that at the point of the accident, the road adjoined enclosed and cultivated fields on one side, but rough timbered and unenclosed lands on the other, and that the stock got upon the road from the unenclosed side, company held liable. Under a proper construction the statute contemplates that the road shall in such case be fenced, not only on the side on which the field is situated, but on both sides.—*Id.*

8. *Practice, civil—Pleading—Replication—Negative pregnant.*—In suit for damages against a railroad company for killing stock, the answer of the road set up a contract on the part of plaintiff to erect a fence along the road, charging that by reason of his failure to fence, the stock got upon the road. Plaintiff in his replication, denied that he was bound by any contract with the company to build a fence on his own land on the line of the said road, as stated by defendant, and denied, "that plaintiff's stock came on said road by reason of plaintiff not building a fence that he was bound to build by reason of any contract he had made." *Held*, that under our liberal practice, such a denial be-

RAILROADS, continued.

- ing collaterally set up in the pleadings, was sufficient to require defendant to produce the contract on the trial, so that its terms could be construed by the court.—*Ells v Pacific R. R. Co.*, 278.
9. *Damages—Railroads—Stock getting on track by trespass on adjoining lands.—Semble*, that when stock of a third party trespass upon the land of a proprietor, adjoining a railroad, and go from thence upon the road and are killed, the company will not be liable for damages.—*Id.*
10. *Corporations—Liability of, for malicious acts of agent—Confined to what cases.*—The result of the cases seems to be, that where corporations have been held liable for the malice of their agents, the acts of the latter were not only in the scope of the supposed authority of the particular agent committing the act complained of, but the act done by the agent was done in the performance of business coming within the purview of the objects and purposes for which the corporation was created, and the powers were conferred by the charter.—*Gillett v. Mo. V. R. R. Co.*, 315.
11. *Railroad corporations—Suits against, for malicious prosecutions—When entertained—Reasonable cause no defense when.*—A railroad corporation is not liable for a malicious prosecution, instituted by its agents, against one of its officers, in the name of the State, for alleged embezzlement of its funds; there being no pretense that any power was given the company to engage in such prosecutions or that they came within the scope of its general powers or purposes.
In such suit for damages the company cannot defend by alleging that there was reasonable cause for the prosecution.—*Id.*
12. *Railroad companies liable to damages for malicious prosecutions when—*Where railroad corporations, through the malice of their officers, institute groundless prosecutions, they should be made liable to the party injured in an action for malicious prosecution.
The prosecution of criminal offenders, especially when irresponsible in a civil action, is not only within the scope of the authority of such corporations but becomes their imperative duty.—*Id.*—*PER ADAMS, J. Contra.*
13. *Railroads—Enclosed timbered lands—Fencing.*—The statute concerning railroad corporations, (Wagn. Stat. § 43,) intended that the company should fence in the line of their roads adjoining all enclosed lands, whether timbered or otherwise.—*Slattery v. St. L., K. C. & N. R. R. Co.*, 362.
14. *Railroads, taxation of—State Board of Equalization—Act of March 10th, 1871, applies to City of St. Joseph—Act constitutional—Taxation under uniform.*—The proper intention and construction of the act of March 10th, 1871, providing a uniform system of assessing and collecting taxes on railroads (Sess. Act, 1871, p. 56), was that all railroad property in this State was to be assessed by the State Board of Equalization; and that they were to ascertain the value of such property within the limits of any city, and transmit that amount as the proper assessment in favor of that city; and that their action in this regard was exclusive of all other officers either State or municipal. Hence, the above act had the effect of repealing by implication the prior charter power of the City of St. Joseph to make the like assessment within the limits of that city
Said act is not void as violating that provision of the State Constitution which declares that taxation on property shall be uniform. (State Const., Art. 1, § 30.) Under that law there is no exemption and no inequality in the taxation. For any omission to assess property or for too low an assessment, the Board is amenable to the same supervision as other Boards performing similar duties.—*State, ex rel, K. C., St. J. & C. B. R. R. v. Severance*, 378.
15. *Railroads—Rolling stock of—Distribution for purposes of taxation—Act March 10th, 1871.*—The rolling stock of a railroad company, as a general principle, should be assessed and taxed where the corporation has its residence. But this principle of law may be modified by the legislature. And it was competent for the General Assembly, by the act of March 10th, 1871 (Sess. Acts

RAILROADS, continued.

- 1871, p. 56) to say that for the purposes of taxation property of that description should be distributed through the counties, cities or towns through which the road passed, in proportion to its length in those respective localities.—*Id.*
16. *Railroads—Act of March 10th, 1871—Taxes how collected by cities, etc., from R. R. Companies.*—It is not an insuperable objection to the act of March 10th 1871, for taxation of railroads, (Sess. Acts 1871, p. 56) that it designates no particular mode by which cities and towns can collect the taxes from the railroads under the valuation made by the Board of Assessment. Where a statute creates a right and gives no remedy, the party may resort to the usual remedy applicable to such case.—*Id.*
17. *Practice, civil—Corporation, appearance of admits existence.*—A corporation, by appearing to a suit, thereby admits its corporate existence.—*Seaton v. Chicago, R. I. & P. R.R. Co.*, 416.
18. *Damages—Suit against railroads for, may be brought in name of party damaged—Jury may award double damages, when.*—Suit against a railroad company to recover double damages for injuries to stock, need not be brought in the name of the State under § 42 of the Railroad Statute (Wagn. Stat., p. 310), but may be instituted under § 43 thereof, in the name of the owner. Double damages, although looked upon as punitive, may be also treated as compensatory.
- In such case the Supreme Court will not reverse the case, because double damages were awarded by the jury instead of the court, no harm resulting from such irregularity.—*Id.*
19. *Damages—Railroads—Contributory negligence of deceased—Legal effect of.*—In suit against a railroad company by the wife for the killing of her husband, under the Damage Act (Wagn. Stat., § 519), if deceased was guilty of any negligence which contributed directly to cause his death, plaintiff cannot recover.—*Karle v. K. C., St. J. & C. B. R. R. Co.*, 476.
20. *Damages—Railroads—Violation of ordinance as to speed, ringing of bells, etc.*—Where a city ordinance, duly authorized by law, expressly requires railroad trains while passing through the city limits, to observe a certain rate of speed, to keep head-lights burning, and the bell ringing, failure to comply with such ordinance amounts to negligence, *per se*. But these violations do not fasten liability on the company, where they did not cause the damage.—*Id.*
21. *Railroads—Trains—Running of at unusual hours—Precautions—What necessary.*—Where a train is run through a populous city at an unusual hour, it is incumbent on its employes to take unusual precautions to avoid accidents, and the failure to do so would authorize a jury to infer negligence.—*Id.*
22. *Railroads—Damages—Exercise of proper care by company—When necessary—Contributory negligence.*—Mere carelessness on the part of the injured person will not excuse a railroad company, if by the exercise of proper care and prudence and the rules and regulations prescribed by law, the injury could have been avoided.—*Id.*

See Carriers, 2; Corporation, 5, 6; Damages, 1, 2.

RECOGNIZANCE; See Practice, civil, 4; Practice, criminal, 1.

RECORDS; See Amendment, 1; Corporations, Municipal, 1; Evidence, 1, 5, 10; Practice, civil—Appeal, 2.

REFERENCES.

1. *Equity—Reference not allowed unless by consent, when.*—In proceedings in chancery to correct a mistake in the description of land in a conveyance, the court, under the statute, (Wagn. Stat., 1040, § 12; 1041, §§ 13, 17,) has no authority to award issues and refer them to be tried by referees, without the written consent of the parties. Such case does not come within the provisions of § 18, p. 1041, Wagn. Stat.—*Caulk v. Blyth*, 293.

REPEAL; See Statute, Construction of, 1

REPLEVIN.

1. *Replevin against constable—Title to property—Assessment of value—Return of to defendant.*—In replevin against a constable for an unlawful seizure, where defendant put in issue plaintiff's title to the property, and the jury found for the plaintiff and assessed the value of the property at a greater sum than the amount of the execution, judgment should be for the return to the constable, of the entire property, or payment to him of its entire assessed value, and not merely for that of an amount equal to the execution. In such case the presumption would be that the jury found plaintiff to have no title to the property.—*Long v. Cockrell*, Adm'r, 93.
2. *Replevin—Action by married woman without joining husband—Remedy by defendant.*—In replevin against a constable where it appears that plaintiff is a married woman, and her husband is not joined, defendant can obtain no personal judgment against her. His appropriate remedy is suit against her bondsmen, under the "Claim & Delivery" act, (Wagn. Stat., p. 1027, § 19,) for failure to prosecute the suit with effect.—*Id.*

REVENUE.

1. *Tax bills—May be amended by City Engineer after expiration of his term.*—A tax bill may be certified anew by a City Engineer, after the expiration of his term of office, in order to cure informalities in his certificate.—*Kiley v. Oppenheimer*, 374.
2. *Railroads, taxation of—State Board of Equalization—Act of March 10th, 1871, applies to City of St. Joseph—Act constitutional—Taxation under, uniform.*—The proper intention and construction of the act of March, 10th, 1871, providing a uniform system of assessing and collecting taxes, on railroads (Sess. Acts 1871, p. 56), was that all railroad property in this State was to be assessed by the State Board of Equalization; and that they were to ascertain the value of such property within the limits of any city, and transmit that amount as the proper assessment in favor of that city; and that their action in this regard was exclusive of all other officers either State or municipal. Hence the above act had the effect of repealing by implication the prior charter power of the City of St. Joseph to make the like assessment within the limits of that city.
Said act is not void as violating that provision of the State Constitution which declares that taxation on property shall be uniform. (State Const., Art. I, § 30.) Under that law there is no exemption and no inequality in the taxation. For any omission to assess property or for too low an assessment, the Board is amenable to the same supervision as other Boards performing similar duties.—*State, ex rel. K. C., St. Jo. & C. B. R. R. Co. v. Severance*, 378.
3. *Railroads—Rolling stock of—Distribution for purposes of taxation—Act March 10th, 1871.*—The rolling stock of a railroad company, as a general principle, should be assessed and taxed where the corporation has its residence; but this principle of law may be modified by the legislature. And it was competent for the General Assembly, by the act of March 10th, 1871 (Sess. Acts 1871, p. 56) to say that for the purposes of taxation property of that description should be distributed through the counties, cities or towns through which the road passed, in proportion to its length in those respective localities.—*Id.*
4. *Railroads—Act of March 10th, 1871—Taxes, how collected by cities, etc., from R. R. Companies.*—It is not an insuperable objection to the act of March 10th, 1871, for taxation of railroads, (Sess. Acts 1871, p. 56) that it designates no particular mode by which cities and towns can collect the taxes from the railroads under the valuation made by the Board of Assessment. Where a statute creates a right and gives no remedy, the party may resort to the usual remedy applicable to such case.
See *Dram-Shop*, 1; *Peddlers*, 1; *Streets*.

ROBBERY; See *Practice*, criminal, 2, 3.

S.

ST. JOSEPH, CITY OF.

1. *St. Joseph, city of—Act amendatory of charter—Recorder—Appeal from judgment of—Trial de novo.*—The act to amend the charter of St. Joseph. (Adj. Sess. Acts, 1863-4, p. 432,) authorizes appeals from the judgments of the recorder in the same manner and to such courts as in case of appeals from justices of the peace (§ 7, 435). *Held*, that the appellate court is authorized to hear and try the cause *de novo*. (Boggs v. Brooks, 45 Mo., 232.)—City of St. Joseph v. Davenport, 572.

SALES; See Sheriffs' Sales.

SCHOOLS AND SCHOOL LANDS.

1. *School—Sub-districts—Teachers in—Removal of, by local board—When authorized—Action of damages—Directors personally liable, when.*—Under the act of 1870, (Wagn. Stat., 1243, § 7, amendatory of Gen. Stat., 1865, p. 258, § 6,) the local directors of a school sub-district have no authority to dismiss a teacher therein, unless for good and sufficient cause shown. And in an action against the board for discharging him, the question of his incompetency, or of the existence of other cause for his removal, is one for the jury to determine, and will not be weighed by this court.

Where the action was not on contract, but to recover damages against members of the board for forcibly dispossessing plaintiff of the school house, and wantonly obstructing him in the discharge of his duty; *held*, that defendants were not acting in the scope of their authority and were individually liable.—McCutchen v. Windsor, 149.

2. *Mortgages to county—Irregular foreclosure—Sale—Title of purchaser as against mortgagor.*—Where the order of a county court foreclosing a mortgage given to the county to secure a school debt, did not truly recite the debt so as sufficiently to identify the mortgage, *held*, that sale thereunder did not transfer any legal title, but the purchaser became in equity entitled to the mortgage debt, and might use the forfeited mortgage to protect him in the possession of the premises against the mortgagor and his heirs. In such case the latter may redeem; and until then the purchaser must account for the rents and profits, which however, may go to the satisfaction of the mortgage debt. (See Jones vs. Mack, 53 Mo., 147.)—Honaker v. Shough, 472.

See County Treasurer.

SCIRE FACIAS; See Practice, civil, 4

SEAL; See Conveyances, 1; Insurance, 1.

SHERIFF; See Executions, 2; Sheriffs' sales.

SHERIFF'S SALES.

1. *Sheriff's sale—Purchase at by plaintiff in execution—Irregularities in judgment, etc.*—Plaintiff in an execution issued on an irregular judgment, who purchases at the sheriff's sale, will hold the title, subject to divestiture by an after reversal of the judgment.—Holland v. Adair, 40.
2. *Sheriff's deed—Recitals in—What will not pass title.*—A sheriff's deed recited a judgment and execution against A. and B., and levy of the same upon their interest in certain described land, and the sale on a day named of all the interest in said land of A., B. and C. It then proceeded to convey to the vendee at the sale all the title of A., B. and C., which the sheriff might sell by virtue of the execution. *Held*, that the sheriff's deed did not pass the title of C. to any land.—Julian v. Boren, 110.
3. *Conveyances—Corrections in open court—Acknowledgment of.*—Where a deed is corrected in open court, there would seem to be no necessity for a formal acknowledgment of the deed there corrected.—Kane v. McCown, 181.
4. *Judicial sales held at church—Effect of.*—Where in consequence of the fact that a Circuit Court House was occupied by United States troops, a neighboring church at the same county seat was used as a court house, a judicial sale

SHERIFFS' SALES, continued.

- at the latter place would not be thereby rendered void. The obvious meaning of the execution law is to require judicial sales to be made at the door of the building occupied and used as a court house.—*Id.*
5. *Deed by sheriff to purchaser—Delivery not necessary, when.*—Where the deed to a purchaser at sheriff's sale is executed, acknowledged and recorded, and his title is decreed by the court to another, and the purchaser transfers to the other his rights under the purchase, no formal delivery by the sheriff to the purchaser is necessary; the law in such cases will presume a delivery.—*Id.*
 6. *Fraudulent Conveyances—Creditors—Participation in frauds, etc.*—A purchaser at an execution sale becomes invested with all the rights of the creditor, and is clothed with all his remedies against fraudulent contrivances of the execution debtor. But those who become interested in the property without participating in the frauds are not affected by them.—*Gentry v. Robinson*, 260.
 7. *Sheriff—Power of sale passes legal title.*—Where a power of sale is conferred on the sheriff by the parties to a deed of trust, the execution of the power transfers the legal title.—*Id.*
 8. *Execution sale, in session of County and not of Circuit Court void.*—An execution sale of land otherwise regular, but made during a session of the County Court, and not shown to be made during a term of the Circuit Court, and a deed made under such sale, would be absolutely void, both in direct and collateral proceedings.—*Bruce v. Leary*, 431.
 9. *Sheriff's sale—Bid—Deed—Title passes, when.*—Until the money is paid and the deed executed, the bidder at a sheriff's sale acquires no title.—*Leach v. Koenig*, 451.
 10. *Sheriff's deed, relates back, when.*—A sheriff's deed, as to defendant in execution and his privies, and as to strangers purchasing with notice, relates back to the date of the sale, and vests the title in the execution purchaser from that time.—*Id.*
 11. *Sheriff's deed—Statutory power—Imperfect execution of, equity will not aid.*—A sheriff in the sale of land acts in the exercise of a statutory power and where his deed contains a false description, a court of equity will not aid the deed, and pass the title. The only remedy in such case is a proceeding to obtain a new deed in the court from whence the process issued.—*Ware v. Johnson*, 500.

See Attachment, 3, 5, 7, 8; Conveyances, 10; Estoppel, 2.

SLANDER.

1. *Slander—Words charged must be proved, how far.*—In suit for slander, the same words, or enough of the same words set out in the petition to constitute the offense charged to have been imputed, must be proved in order to entitle plaintiff to a verdict. And it is not enough to prove different words of similar import.—*Clements v. Maloney*, 352.
2. *Slander—Circumstances of plaintiff, etc., may be taken into consideration.*—In suit for slander, it is proper to instruct the jury in estimating damages, to consider the circumstances of the plaintiff, including not merely his pecuniary condition, his family and the like, but all the circumstances of the case which give character to the slander and the injury occasioned thereby. And the jury may give punitive damages. (*Buckley vs. Knapp*, 48 Mo., 152.)—*Id.*
3. *Slander—Action of—Contract—Technical variance, effect of.*—In action of slander where a contract is referred to in the petition merely by way of preliminary inducement, the contract is not rendered inadmissible in evidence by reason of a technical variance between the instrument and the allegations of the petition, where the effect of such variance is not to mislead the jury. (*Wagn. Stat.*, 1033, § 1.)—*Id.*

STATUTES, CONSTRUCTION OF.

1. *Statute—Repeal of by implication not favored—Question of repeal one of intent.*—A general affirmative statute will not repeal a former one which is special in its nature, unless negative words are used or the acts are so inconsistent, that they cannot stand together.

In such cases there is nothing but repeal by implication, and repeals in that manner are not favored. But the question is really one of intention, and where legislative intent is manifest it must prevail.—*State, ex rel. K. C., St. Jo. & C. B. R. R. Co. v. Severance*, 378.

2. *Construction of statute—Repeals—Remedies when concurrent—When not.*—The settled rule is that if a statute gives a remedy in the affirmative, without containing any express or implied negative, for a matter which was theretofore actionable at common law, this does not take away the common law remedy. And the same rule holds in civil and criminal cases.—*State v. Bittinger*, 596.

STATUTES CONSTRUED.

ADMINISTRATION, 6, (Wagn. Stat. 1274, § 3,) 7, (Wagn. Stat. 103, §§ 12, 15).

ATTACHMENT, 2, (Wagn. Stat. 1054, § 12,) 5, (Wagn. Stat. 182, § 6,) 11, (R. C. 1855, 1225, § 17).

CORPORATIONS, 2, (Wagn. Stat. 333, § 2; 289, § 4,) 5, (Wagn. Stat. 293, § 22; R. C. 1855, ch. 38, §§ 32, 39).

COSTS, 1, (Wagn. Stat. 393, § 12).

COURT, BUCHANAN COMMON PLEAS, 1, (Sess. Acts 1865, 83).

COURT, CALDWELL COMMON PLEAS, 1, (Sess. Acts 1870, 209).

DRAM-SHOPS, 1, (Wagn. Stat. 1872, 554, § 29).

EJECTMENT, 4, (Wagn. Stat. 561, § 20).

EQUITY, 3, (Wagn. Stat. 1044, § 13).

EVIDENCE, 5, (Wagn. Stat. 595, §§ 35, 36).

EXECUTIONS, 1, (Sess. Acts 1863, 20,) 2, (Gen. Stat. 1865, 647, §§ 59, 63).

FRAUDS, STATUTE OF, 1, (Wagn. Stat. 656, § 5).

GUARDIAN AND WARD, 1, (Wagn. Stat. 539, § 4).

JEOFAILS, 1, (Wagn. Stat. 1034, § 5; 1036, § 19; 1037, § 20; 1067, § 33).

JUSTICES' COURTS, 9, (Wagn. Stat. 849, § 10,) 10, (Wagn. Stat. 809, § 3).

LANDLORD AND TENANT, 1, (Wagn. Stat. 880, § 15).

LIMITATIONS, 1, Wagn. Stat. 919, § 16.)

NORTHWESTERN INSANE ASYLUM, 1, (Wagn. Stat. 1706, § 7; 459, § 43; 170, § 25).

PEDDLERS, 1, (Wagn. Stat. 979, § 127).

PRACTICE, CIVIL, 1, 5, (Wagn. Stat., 1022, § 51; 1094, §§ 36, 37).

PRACTICE, CIVIL—APPEAL, 3, (Wagn. Stat. 1044, § 30).

PRACTICE, CIVIL—PLEADING, 5, (Wagn. Stat. 1029, § 4,) 8, (Wagn. Stat. 1020, § 42).

PRACTICE, CIVIL—TRIALS, 3, (Wagn. Stat. 1041, § 14).

PRACTICE, CRIMINAL, 12, (Wagn. Stat. 500, § 91).

PRACTICE, SUPREME COURT, 10, (Wagn. Stat. 1043, § 28; 1044, § 31).

QUIETING TITLES, 1, (Wagn. Stat. 1022, §§ 53, 54).

RAILROADS, 1, (Wagn. Stat., 310, § 38,) 4, (Wagn. Stat. 307, § 28,) 6, 7, 13 18, (Wagn. Stat. 310, §§ 42, 43).

REFERENCES, 1, (Wagn. Stat. 1040, § 12; 1041, §§ 13, 17, 18).

REFLEVIN, 2, (Wagn. Stat. 1027, § 19).

REVENUE, 2, 3, 4, (Sess. Acts 1871, 56).

ST. JOSEPH, CITY OF, 1, (Adj. Sess. Acts 1863, 432).

STATUTES CONSTRUED, continued.

SCHOOLS AND SCHOOL LANDS, 1, (Wagn. Stat. 1243, § 7).

VARIANCE, 1, 2, (Wagn. Stat. 1033, § 1).

VENUE, CHANGE OF, 1, (Wagn. Stat., 1097, § 15, 19; Sess. Acts 1873, 56, 57;)

2, (Wagn. Stat. 1005, § 3,) 3, (Wagn. Stat. 1357, § 12).

WILLS, 2, (Wagn. Stat. 1364, § 3.)

STOCK; See Corporations, 5, 6; Railroads, 2.

STOCK, KILLING OF; See Damages, 2; Railroads, 1, 6, 7, 8, 9, 18.

STREETS.

1. *Damages—Street grading—Measure of liabilities of cities.*—Where a street is graded and constructed wholly for the use of the public, no right of action accrues to persons having property fronting on the street improved, in consequence of resulting injuries, unless the injury can be shown to have been caused by the negligent or improper manner in which the work is done by the city or its employees.—*Imler v. City of Springfield*, 119.

2. *Damages—Grading of streets—Surface water—Injuries to adjoining property by reason of.*—City authorities are not liable for damages caused merely by reason of failure to so grade a public street as to prevent surface water from flowing upon the lots of the adjoining proprietors. But *semble*, that the rule does not embrace cases where the municipality fills up or dams back a stream of running water with defined banks.—*Id.*

3. *Tax bills—May be amended by City Engineer after expiration of his term.*—A tax bill may be certified anew by a City Engineer, after the expiration of his term of office, in order to cure informalities in his certificate.—*Kiley v. Oppenheimer*, 374.

4. *City charter—Ordinance—Advertisement for street improvement contracts—Premature award—Effect of.*—Where an ordinance made in pursuance of a city charter required the City Engineer to give at least thirty days advertisement for proposals for street macadamizing contracts, an award of the contract in the meantime would be void, and work done on such contract would not lay the foundation for recovery on a special tax bill against the property owner.—*Id.*

SURETY.

1. *Principal and surety—Extension of time—Contracts—Concurrence of surety—Pleadings.*—The surety on a bond will not be discharged by reason of an extension given to his principal, unless the time was extended by virtue of a contract made by the creditor with the principal, and without the concurrence of the surety. And the extension cannot be pleaded as a defense by the surety unless these facts be set up.—*Mueller, Adm'r, State to use of v. Mannig*, 142.

2. *Practice, civil—Demurrer—Non-joinder of parties—Principal and surety.*—In an action to recover money charged to have been fraudulently obtained by defendant, the petition alleged that a judgment had been rendered against plaintiff as principal and defendant as surety on a bond; that defendant falsely represented that he had paid off and satisfied the execution; that on the faith of such representation, at the instance and request of plaintiff one "A." paid defendant the amount sued for; that, in point of fact, the judgment had been satisfied, not by defendant, but by one "B." Demurrer charging defect of parties held not well taken. Although B. might sue defendant, as one of the defendants in the original execution, for money paid to his use, he could not sue on the claim of "A." as there was no privity between them, and defendant could not be held liable to "A." for the money paid by him, the same being paid at the instance of plaintiff. Money so paid might be considered as paid by plaintiff, who would have a right to look to defendant, while "A." could look to plaintiff.—*Menefee v. Arnold* 363.

3. *Guardian—Defalcation by—Liable after discharge in bankruptcy for money paid by surety, when.*—Where a guardian makes default, and his surety is forced to pay the deficit, the principal remains liable to his surety, notwithstanding the discharge of the former in bankruptcy, for the full amount paid on his behalf. (Nat. Bkpty. Act, §§ 19, 32, 33, 35.)—*Halliburton v. Carter*, 435.

SURETY, continued.

4. *Surety—Money paid by, for principal—Recoverable how—Implied promise.*—The law is well settled that where a surety pays the debt of his principal, an implied promise on the part of the latter arises to refund the money, and the money may be recovered in an action at law.—*Id.*
See Bills and Notes, 1; County Treasurer, 1.

T.

TENDER.

1. *Tender, how must be accepted.*—A party must accept a tender as made, or he must reject it; he cannot accept it and prescribe the terms of his acceptance.—*Adams v. Helm*, 468.
2. *Tender—Time of—Objection as to, when waived.*—A party is presumed to waive the objection that a tender is not in time, if he does not raise that objection when the tender is made.—*Id.*

TOWNS; See Corporations, Municipal, 2.

TOWNSHIPS.

1. *Counties, political sub-divisions of the State.*—Counties are sub-divisions of the State for governmental purposes, and the General Assembly may create, alter, abolish and regulate them as expediency may demand, so that no vested rights are interfered with.—*Opinion of Supreme Court Judges on Township Organization Law*, 295.
2. *Township Organization Law constitutional—Does not delegate legislation.*—The Township Organization Law is not unconstitutional. It is a general law, which takes effect from and after its passage. If the majority of the voters in a county vote for it, the vote does not create the law, but places the county so voting within its provisions. The law does not delegate legislative authority to the counties. (See *State ex rel. vs. Wilcox*, 45 Mo. 458, and authorities cited.)—*Id.*
3. *Township Law unconstitutional—Delegation of power to counties.*—The Township Organization Law is unconstitutional, for it attempts to delegate the legislative power to the different counties of the State. It derives vitality from the action of the several counties, and without such action would remain a dead letter. It has force from its passage merely for the purpose of transferring the power, to adopt the act, from the legislature to the counties. (*State vs. Field*, 17 Mo., 529.)—*Id.* per VORIES, J. dissenting.

TRESPASS; See Land and Land Titles, 9, 10;—Practice, civil—Pleading, 5

TRUSTEES' SALES; See Mortgages and Deeds of Trust.

TRUSTS AND TRUSTEES.

1. *Conveyances—Construction—Trusts—Uses.*—A conveyance was made to A. a married woman, conveying certain land to "her and her heirs forever," and providing that if B., who was a son of A., "should pay to each of the other heirs five hundred dollars and keep his father during life, then he will have and shall hold the same, and to his heirs and assigns forever, otherwise the same to be divided with all the heirs equally." *Held*, that the deed was not intended to vest the estate to the land, legal and equitable, in the grantee, but that she was to have the whole estate until the death of her husband, and at his death she became a trustee for B. and his brothers and sisters, the children of her husband; that by the terms of the deed B. was to be the sole beneficiary if he supported his father during his life, and paid the other children five hundred dollars each, but if he failed to do this, he was to share equally with the other children; and as a person while living cannot have heirs, the word heirs was not used in its technical sense, and meant the children of A's. husband.—*Cornelius v. Smith*, 528.
2. *Trusts—How created—How manifested.*—A trust need not be created by writing, but must be manifested and proved by writing.—*Id.*
See Mortgages and Deeds of Trust; Pre-emption, 1; Trustee's Sales.



U.

USURY; See Bills and Notes, 2.

V.

VARIANCE.

1. *Slander—Words charged must be proved, how far.*—In suit for slander, the same words, or enough of the same words set out in the petition to constitute the offense charged to have been imputed, must be proved in order to entitle plaintiff to verdict. And it is not enough to prove different words of similar imports.—*Clements v. Maloney*, 352.
2. *Practice, civil—Probata and allegata—Variance, when and how taken advantage of.*—Where a party has been misled by reason of a variance between pleadings and proof, and fails to file his affidavit, setting forth in what respect he has been so misled, as provided in the statute (Wagn. Stat., 1033, § 1), he cannot avail himself of the objection in the Supreme Court.—*Id.*

VENDOR'S LIEN; See Lien, Vendor's.

VENUE, CHANGE OF.

1. *Practice, criminal—Venue, change of—Discretionary with court to grant, when—Amended statute touching.*—Where the prisoner applied for change of venue on the ground of prejudice in the judge and the application was made properly and in time, under § 19, (p. 1097, Wagn. Stat.,) it was imperative on the court to grant the application. But under the act of 1873, amending § 19 (Sess. Acts 1873, pp. 56-7,) it was left discretionary with the court either to grant or refuse the prayer.
Section 19, and its amendment apply equally to all petitions for change of venue as well when made for causes set forth in § 15, as in subsequent ones of the statutes. (Wagn. Stat., p. 1097.)—*State v. O'Rourke*, 440.
2. *Land titles—Action to set aside deed—Change of venue—Jurisdiction—Construction of statute.*—In a proceeding to set aside a conveyance of lands, venue may be changed from the county in which the land is situated, and the court to which the cause is so removed will thereby obtain jurisdiction of the *res*. This proposition is not in conflict with the Practice Act. (Wagn. Stat., 1005, § 3.)—*Henderson v. Henderson*, 534.
3. *Change of venue—Failure to transmit papers—Discontinuance, etc.—Motion to dismiss—Appearance.*—A case, sent by change of venue from one court to another, is not discontinued by reason of the failure of the clerk to transmit the transcript before the third term after the date of the order. The statute (Wagn. Stat., 1357, § 12), is directory merely. But *semble*, that where the other party appears in the court to which the cause is removed, at the second term after date of the order, produces the order, and prays a discontinuance on the ground that no transcript has been sent over, the court may be justified in dismissing the cause. But it is otherwise, where the parties appear and go to trial.—*Id.*

W.

WAIVER; See Insurance, 4.

WASTE; See Ejectment, 4.

WATER-COURSES; See Land and Land Titles, 7, 8.

WILLS.

1. *Wills—Under general law, what signing insufficient.*—As a general rule of law, where the name of the testator is not subscribed at the conclusion, but only appears in the exordium or body of a will, the instrument, in order to its validity, must have been in the handwriting of the testator and he must have intended the signature, wherever inserted, to be the authentication of the instrument, and must have contemplated no further signing.

WILLS, continued.

Where the will concludes, "In witness whereof, I have hereunto set my hand," etc., a different signing being clearly contemplated, the formal recital of his name elsewhere in the instrument would be insufficient.—*Catlett v. Catlett*, 330.

2. *Will—Signature—What necessary under the statute.*—Under the statute law of Missouri, a will written by an attorney at the request of a friend, out of the presence of the testator, and not subscribed, is not "signed" within the meaning of the statute (Wagn. Stat., 1864, § 3), although the name of the testator appear in the exordium or body of the will, and is invalid, although expressly assented to by him and duly attested in his presence.

The statute, *supra*, is imperative, and the "signing," therein referred to, must be construed to mean the affixing of the testator's name at the bottom of the will, either in his own handwriting or that of some one else by his direction.—*Id.*

WINE; See Dram-shop, 1.

WITNESSES.

1. *Evidence—Married women—Declarations of—Testimony concerning.*—As to matters touching which a married woman is an incompetent witness, testimony concerning her declarations is inadmissible.—*State v. Arnold*, 89.

See Evidence, 7, 8, 9; Practice, criminal, 5.